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THE ANTENUPTIAL CONTRACT

CHARLES W. GAMBLE*

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I. INTRODUCTION

Legion are the judicial statements that the antenuptial contract[1] is favored by public policy as being conducive to the welfare of the marriage relationship, and useful toward removing one of the frequent causes of family disputes—contentions about marital property rights.[2] If an antenuptial contract does serve such high, noble and encompassing purposes, then it would seem mandatory for attorneys to utilize this device frequently. However, the cases involving antenuptial contracts are comparatively few in number. Of course, the preferred analysis would be that such cases are few in number because the majority of antenuptial contracts are never involved in litigation. However, this writer believes that, to a great

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* Assistant Professor of Law, Cumberland School of Law, Samford University, Birmingham, Alabama; J.D. University of Alabama, 1968; LL.M. Harvard University, 1971.

1. Also called prenuptial contract, antenuptial agreement and antenuptial settlement. *See* 3A WORDS AND PHRASES 32 (1953); 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS 90-22 (1964).

2. *See, e.g.*, Norris v. Norris, 174 N.W.2d 368 (Iowa 1970); French v. McAnarney, 290 Mass. 544, 195 N.E. 714 (1935); Gartner v. Gartner, 246 Minn. 319, 74 N.W.2d 809 (1956); Wilson v. Wilson, 354 S.W.2d 532 (Mo. App. 1962); *In re* Moore's Estate, 210 Ore. 23, 307 P.2d 483 (1957).

extent, the infrequent use of the antenuptial contracts is due to the fact that it is largely a forgotten instrument. The reasons are three-fold: (1) attorneys do not suggest its use; (2) few couples avail themselves of premarital legal counseling; and (3) the attitude of the courts toward antenuptial contracts is so restrictive, indefinite and unpredictable as to preclude widespread and consistent use.

The task before every court faced with possible enforcement of an antenuptial contract is to explore the extent to which espoused parties will be allowed to alter the incidents of their forthcoming marriage. If two mature individuals, prior to marriage, determine by contract some of the incidents of the marital relationship, undoubtedly their concern will focus primarily upon two contingencies—divorce and death. This article will discuss the stipulation of rights and liabilities upon the happening of either event. An underlying issue, however, which will be treated first, is the role of the lawyer in premarital planning.

At least one writer has suggested that it is just as logical for a lawyer to help the parties in preparation for marriage as it is for a doctor to aid them.[3] The idea is that the spouses' relationship with any attorney can be, and often is, just as extended and recurrent as their relationship with a physician. On this basis, one can consider the feasibility of the engaged couple discussing and subsequently drafting an antenuptial contract which will be a guide to the rights and liabilities of their marriage relationship. If the lawyer is given and accepts this expanded role in domestic relations, then obviously his effectiveness will be determined by the attitude of the courts toward these agreements. If this role as a marital counselor is to be adequately developed, these contracts must be judged objectively rather than with a preconceived attitude that they are automatically void. There must also be a reexamination of those areas of marital rights which have heretofore been forbidden as subjects of antenuptial contracts. This will further require a reexamination of the sociological realities of today's marriages and an updating of judicial attitudes regarding them.

It is the hope of this writer that at least the four following points will be made clear during the course of this article: (1) that there are, today, uses for the antenuptial contract which are largely ignored; (2) that many of the uses for the antenuptial contract are equally applicable to the young compassionate couple as well as to the older companionable one; (3) that the courts have often taken too negative a view of antenuptial contracts, an attitude which has contributed to their disuse; and (4) that even though the male's supposed intellectual dominance over the woman is seen throughout the law of antenuptial agreements as requiring legal protection for the "weaker" female, this premise is contrary both to the contemporary concept of the equality of women and to the freedom of mature parties to chart the rights and liabilities of their marriage relationship.

3. Javert, *Guidelines for a Marriage Contract*, 4 TRIAL 46 (1968).

II. THE ANTENUPTIAL CONTRACT—OLD INSTRUMENT FOR MODERN TIMES—A PANORAMA OF USES

The traditional applications of the antenuptial contract are but two of the many possible uses for this instrument. It would, perhaps, be too presumptuous to claim that this arrangement is coming into its own as a viable inter-spousal instrument. However, antenuptial contract litigation is constantly increasing in practically every jurisdiction. It has been reported, for example, that over a two year period, the State of Florida experienced a four-fold increase in such litigation.[4] The Kentucky Court of Appeals has observed this trend, remarking that antenuptial contracts have become a fruitful source of litigation in that state.[5] In response to this phenomenon of increasing litigation, one of two conclusions are possible: (1) that more people are using the antenuptial contract to govern inter-spousal rights and liabilities; or (2) that there are simply more people contesting these agreements in the courts. The former conclusion would seem to be more logical.

If increasingly more people are utilizing antenuptial contracts, then the courts will be faced with several challenges. First, the courts will be compelled to reevaluate their approach to areas, such as spousal support, in which espoused parties have historically been forbidden to contract. As more people attempt to contract premaritally in these areas, courts will then be obliged to decide whether there is too great a lag between legal precedent and the societal norm.[6]

Secondly, the courts must decide whether the applicable rules governing these instruments are sufficiently definite, clear and predictable. As more people enter into antenuptial contracts, it will be mandatory for the courts to formulate concrete rules that will facilitate the execution of these legally binding agreements.

The third challenge that will be facing the courts, in the wake of increased use of premarital agreements, is the recognition or nonrecognition of newly conceived uses for the antenuptial contract. These instruments are largely an untapped source of private ordering of marital rights and liabilities. Increased recognition and utilization of these instruments will give rise to new and wider uses for them.

A. *Use of the Antenuptial Contract to Alter or Liquidate the Husband's Duty to Support the Wife*

The approach of the courts to any antenuptial contract governing the husband's duty of support has generally been a negative one. This duty of the husband has been viewed as one of the untouchables among

4. Murray, *Family Law, 1961-62 Survey of Florida Law*, 18 U. MIAMI L. REV. 231, 251 (1963).

5. Brown v. Brown, 265 S.W.2d 484 (Ky. 1954).

6. V. AUBERT, SOCIOLOGY OF LAW 90 (1969).

legal responsibilities.[7] Despite this negative judicial attitude, prospective spouses have continued their attempts, via the antenuptial contract, to avoid, alter or liquidate the husband's duty of support. Such attempts will continue since they reflect a change in our society regarding marital financing. Although any argument that a husband should be allowed by contract to entirely absolve himself of the support duty is perhaps futile, there nevertheless is a trend in our society towards absolving the husband from total responsibility for support of the family. This would appear to be a manifestation of the nation-wide trend of legal equality for men and women.[8] The passage of state statutes making the wife secondarily liable for the family's support when she has sufficient means and her husband does not, is a step in the direction of taking the entire burden for support off the husband's shoulders.[9] This same idea would appear to be the basis of those statutes in community property states which impose mutual obligations of support on both the husband and wife.[10] Inextricably connected with this trend toward equalization of the support burden, and in some measure justifying it, is the constant increase in the married female work force.[11] This trend would seem to indicate that the husband's duty of support should be subject to some modification. If the marriage is viewed as a partnership or joint venture, then some equalization of the family support burden between husband and wife is in order.

There are some decisions which indicate a judicial recognition of the power of spouses to alter the support duty.[12] These cases, however, are few in number because couples generally have not been satisfied to merely alter the husband's duty of support. Practically every antenuptial

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7. *See, e.g.*, Williams v. Williams, 29 Ariz. 538, 243 P. 402 (1926); Smith v. Smith, 154 Ga. 702, 115 S.E. 723 (1922); Warner v. Warner, 235 Ill. 448, 85 N.E. 630 (1908); French v. McNarney, 290 Mass. 544, 195 N.E. 714 (1935); Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961).

8. *See* C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 308 (1966).

9. *See, e.g.*, OHIO REV. CODE ANN. § 3103.03 (Page 1960).

10. *See, e.g.*, CAL. CIV. CODE § 5132 (West Supp. 1971):

> The wife must support the husband when they are living together out of her separate property when he has no separate property and there is no community property or quasi-community property and he is unable from infirmity, to support himself.

See also WASH. REV. CODE ANN. § 26.16.205 (1961):

> The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

11. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, table no. 35 (91st ed. 1970).

Out of 47,038,000 married women in the 1969 population of the United States, 19,100,00 worked outside the home. Thus, out of the entire female married population, 39.6 percent were in the labor force. *Id.* at table no. 330. Those married women compose 63.9 percent of the entire female labor force in the United States. In 1964, figures revealed that in 21 percent of those families where the wife worked full time throughout the year, she contributed at least one-half of the total family income. C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 319 (1965).

12. *See* notes 13-17 *infra* and accompanying text.

contract involving support provides for a complete abrogation of the support duty, and the courts, as reflected by their negative attitudes, are not ready to allow such a broad freedom of contract between espoused parties.

In harmony with the ideas of the family as a partnership and the equalization of husband and wife, an Iowa antenuptial contract provision of the early 1900's presents a reasonable example of the type of support modification that is most likely to be enforced by the courts. This provision, presented in the case of *In re Mansfield's Estate*,[13] reads as follows: "Each party hereto hereby agrees to contribute to the family running expenses in proportion to their net income from their respective properties."[14] Although the court in *Mansfield* held this agreement to be binding and enforceable, the decision as a whole was somewhat less than encouraging. The contested issue was whether the widow could enforce the contract against her deceased husband's estate. However, the crucial question was whether the court would have enforced the contract provision had it been sued upon during a going marriage (the court at least implied that it would have enforced it). Although *Mansfield* was not a strong endorsement of interspousal power to alter support during marriage, it is, nevertheless, a recognition that the ability to alter the support obligation may be possible. However, an application of *Mansfield* has not been forthcoming due principally to two factors: (1) the only antenuptials contracts which the courts have been asked to enforce are those providing for a complete abrogation of the husband's duty of support; and (2) all the cases involving antenuptial contracts modifying support have been decided on collateral issues. The issue of support modification versus abrogation has never been squarely presented to or answered by the courts.

For example, in the Kentucky case of *Atkins v. Atkins*,[15] an antenuptial contract essentially provided that the husband and wife would be liable for their respective necessities. This clause presented a perfect opportunity for a court to resolve the question of whether a premarital support modification agreement would be enforced during the marriage. However, due to the manner in which the case arose and the form of the resulting decision, this was not to be. The litigation commenced after the wife's death and concerned whether, under the contract, the husband or the wife's administrator would pay for her last doctor bills. The court held that the husband was responsible for paying the physician and that the antenuptial contract was void insofar as it might affect third persons. Although the decision was encouraging in its failure to completely void the support modification agreement, it was equally disappointing since the court, in holding the agreement void as to creditors, barred any substantial alteration of the husband's duty to support his wife.

13. 185 Iowa 339, 170 N.W. 415 (1919).
14. *Id.* at 341, 170 N.W. at 415.
15. 203 Ky. 291, 262 S.W. 268 (1924).

An Iowa decision at least implied some judicial propitiousness for antenuptial liquidation of the husband's support obligation. *In re Thorman's Estate*[16] involved an antenuptial contract stipulating that the husband would pay the wife $104 per year as long as the couple lived together. However, the contract also contained a provision waiving the wife's rights in the husband's estate. The wife argued that the entire contract was void because of the provision liquidating support. The court did not accept this argument and held the contract valid. This decision, however, was far from a complete recognition of support modification. The court emphasized that it had no evidence of the husband's assets, and apparently would not have held this liquidation clause valid if it had been found to be unfair in light of the husband's means.

Garlock v. Garlock[17] is the only reported case in which a court has squarely faced the issue of whether to enforce a support liquidation contract during a marriage. In *Garlock*, the husband and wife *postnuptially* agreed that the husband would pay the wife $15,000 per year in twelve equal monthly payments. This was to be in lieu of all support, but excepted any expenses incurred by the wife during sickness. The husband ceased making payments under the agreement after three years, and the wife then brought suit upon the contract. In upholding the contract, the lower court recognized that the

> husband and wife are best qualified to judge the amount required for the wife's support. They are at liberty to reduce to a certainty the amount of money which the husband will pay to discharge an obligation which might cost him more or less than what he has agreed to pay.[18]

However, this declaration of marital freedom was shortlived. In reversing the lower court, the Court of Appeals came to the wife's rescue and stated its concern that "out of the goodness of her heart and in reliance upon his good nature she may have signed such a contract of her own free will, and yet no court would hold her bound by it, especially if she became in need through sickness or other misfortune."[19] Despite the Court of Appeals' definitive refusal to enforce this contract, two questions remain unanswered: (1) would the court's attitude have been different if this had been an antenuptial contract rather than a postnuptial one; and (2) is there any formula that can be devised which will give the support liquidation contract judicial survival?

Whatever progress is made toward modifying support agreements after marriage will depend upon the form of the agreement before the

16. 162 Iowa 316, 144 N.W. 5 (1913).

17. 255 App. Div. 88, 5 N.Y.S.2d 619 (1938), *rev'd* 279 N.Y. 337, 18 N.E.2d 521 (1939).

18. *Id.* at 90, 5 N.Y.S.2d at 621.

19. Garlock v. Garlock, 279 N.Y. 337, 341, 18 N.E.2d 521, 522 (1939).

court. The foregoing cases indicate that, to be enforceable, such an instrument must have the following characteristics:

(1) It cannot be a complete abrogation of the husband's support duty;
(2) There must be evidenced an attitude of the spouses that the marriage is a partnership in which both must bear the financial burden;
(3) The wife must have some separate income unless the husband contracts to pay an amount sufficient to provide completely for her;
(4) The agreement should provide that the husband will remain responsible for unforeseen expenses of his wife; and
(5) The amount contracted for by the husband should not be unreasonable in light of his means.

B. *Use of the Antenuptial Contract to Prevent One Spouse from Contesting the Other's Will*

Another function of the antenuptial contract is to give one a sense of testate security. With all the possible pitfalls involved in the proper execution of a will, a testator or testatrix may find it comforting to know that at least the spouse will not be contesting the validity of his or her expressed wishes. The ever present possibility of an invalid will is compounded by the number of people who execute these instruments without legal advice. Certainly there is no greater frustration than the thought that one's estate planning could be completely disrupted by a spouse's discovery of some legal defect in the will, allowing that spouse to receive an intestate share of the estate. Likewise, there is the possibility that the wife, even in the absence of valid grounds, will contest the will and thereby thwart the testator's wishes by causing added and unexpected expenses for his estate. If a husband provides a limited amount for his wife in his will or disinherits her (ignoring for the moment her right to dissent and take a dower interest), then the antenuptial contract stands as an added assurance that his testamentary wishes will be carried out.

The legality of this use for the antenuptial contract has been litigated only in very few instances. Generally, where prospective spouses renounce any rights to each other's property in an antenuptial contract, the survivor is estopped from contesting the will of the deceased spouse. The body of cases constituting the law in this area are of the older variety, and have been infrequently cited in more recent decisions. For example, in an 1854 Maryland case, *Maurer v. Naill*,[20] the prospective spouses executed an antenuptial contract providing that at the death of either spouse his or her property would not be claimed by the survivor. The husband then made a will but failed to have it witnessed. Despite this

20. 5 Md. 324 (1854).

defect, the court held that the antenuptial contract deprived the widow of any standing to contest the validity of this will.

This rule of law was applied again, forty-nine years later, in *Biggerstaff v. Biggerstaff*.[21] In that case, the husband had executed a will prior to his second marriage. After his death, his widow argued that their marriage automatically revoked any disposition of property to the children of his former marriage. Her litigous plan, however, was foiled when the court held that she had no standing to contest the will because of an antenuptial agreement in which she had waived all interest in her husband's estate.

The most recent case involving a spouse's standing to contest a will was *In re Green's Estate*.[22] In that case, instead of waiving all interest in her prospective spouse's estate, the contesting wife antenuptially agreed to receive $18,000 per year for life in lieu of all interests in her husband's estate. The court held that even though the will was executed prior to their marriage, the wife had no standing to contest the will's admission to probate.

Because only a few reported cases have involved the use of an antenuptial contract to defeat a surviving spouse's right to share in the deceased spouse's estate, several questions remain unanswered. The first question is whether an antenuptial contract providing only that the wife promises not to contest would preclude her from contesting her husband's will. Obviously, waiver is inapplicable because no waiver of property rights by the wife has taken place. No case has been found involving the enforcement of an antenuptial agreement whereby one spouse expressly *promises* not to contest the other's will. When and if the courts are faced with this problem, the answer will likely be found by an analogy to postnuptial agreements, where the traditional rule is that a bona fide agreement to refrain from contesting the will by one interested in the testator's estate is valid.[23]

The second question regarding the antenuptial contract as a bar to contesting the deceased spouse's will is whether the agreement must meet the requirements normally imposed upon an antenuptial contract—good faith and full disclosure.[24] The reported decisions conspicuously lack any discussion of this question. For example, as pointed out by an Arizona court,[25] the Kentucky court in *Biggerstaff*[26] simply assumed that the contract was validly executed and that the wife entered into the contract freely and intelligently. The only substantive comment upon this question by any court was that of a New York surrogate court judge who wrote:

21. 95 Ky. 154, 23 S.W. 965 (1893).
22. 165 Misc. 108, 2 N.Y.S.2d 505 (Sur. Ct. 1937).
23. *See* Annot., 55 A.L.R. 811 (1928).
24. See section IV, B *infra*.
25. *In re* Mackevich's Estate, 93 Ariz. 129, 379 P.2d 119 (1963).
26. 95 Ky. 154, 23 S.W. 965 (1893).

> I have considered the evidence and the arguments advanced by counsel in their briefs. I am satisfied that the execution of the antenuptial agreement by [the wife] was not procured by fraud of any kind but, on the contrary, that she signed it voluntarily with knowledge and understanding of its provisions . . . .[27]

This comment implies that for a valid premarital waiver of a wife's right or standing to contest her husband's will, the wife must be afforded all the safeguards normally called for in the execution of any antenuptial contract waiving property rights.[28]

A final unanswered question is whether a wife may still be estopped to contest her husband's will even though the antenuptial contract is invalid. The only case directly dealing with this question, *In re Mackevich's Estate*,[29] held that the antenuptial contract was void because an applicable state statute provided that any agreement attempting to alter the laws concerning the descent of property was invalid.

Despite the invalidity of the contract, the beneficiaries of the deceased husband's will argued that by executing the antenuptial agreement, the wife had impliedly agreed to the distribution in the will which was executed prior to their marriage. Thus, the wife was estopped to assert the invalidity of the agreement because the deceased husband relied upon her assent to the will's effectiveness. Although the court finally denied recovery to the beneficiaries of the husband's will, it recognized that a theory of estoppel could apply to such cases. The estoppel doctrine was not applicable to these particular facts because pertinent provisions of the antenuptial agreement were inserted and the contract was signed without the prospective husband and wife having read it. With these elements missing, the court held that there was no estoppel. The importance of this decision is not its holding, but rather the recognition that a wife may be estopped to contest her husband's will after executing an invalid antenuptial contract in which she waives that right or waives her standing to contest. Although these cases leave several questions unanswered, it appears that the security to be gained by the use of antenuptial contracts far outweighs any uncertainty that may occur in enforcing them.

C. *Use of the Antenuptial Contract to Abrogate the Community Property Regime*

Prospective spouses who reside in a typical community property state are faced with a system that classifies both property acquired and income derived during the marriage as community property. It is readily predictable that some engaged parties will desire to circumvent such an established doctrine.

There are several conceivable reasons why parties would desire to

27. *In re* Green's Estate, 165 Misc. 108, 109, 2 N.Y.S.2d 505, 507 (Sur. Ct. 1937).
28. *Cf. In re* Estate of Harris, 431 Pa. 293, 245 A.2d 647 (1968).
29. 93 Ariz. 129, 379 P.2d 119 (1963).

avoid the effects of the community property system: (1) the prospective wife may have children by a prior marriage and may wish to use her income solely for their support; (2) the prospective husband may accumulate income far in excess of that needed to support his wife and thus wish to have it remain his separate property; and (3) both spouses may prefer to keep property acquired during marriage separate in the event of divorce or death. These motives for using the antenuptial contract to avoid the community property laws are by no means exclusive, but are offered to indicate that the antenuptial agreement is still a viable instrument in community property states.

The validity of the antenuptial contract in community property states depends on how receptive the particular jurisdiction is to abrogation of its community property rules. This determination often depends upon legislative interpretation and history. The community property states, especially Arizona, California, Idaho, Nevada, New Mexico, Texas and Washington,[30] derive their property concepts from the Spanish system.[31] The Louisiana system, on the other hand, is based on the French property system.[32] The important point, however, is that both the Spanish and French community property systems were grounded upon an optional basis. The parties were presumed to have adopted the community property laws unless they provided otherwise.[33] As one authority phrases it: "[I]t was permitted to the spouses to contract, agree or stipulate as between themselves either before, at the time of or even during marriage, as to the manner in which they wished to share the property earned or gained during the marriage."[34] This historical receptiveness of the community property system to abrogation by private agreement was carried over into the American jurisdictions. Most of the community property states have prefaced their community property statutes with a provision that they are only applicable if the spouses have made no agreement to the contrary.[35] If the prospective spouses enter into an agreement altering the community property laws, they are said to have created a "conventional community."[36] Some authorities describe this as creating a "contractual community," as opposed to entering into no agreement and thus allowing the imposition of a "legal community."[37]

30. *See* A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 266 (1969).

31. *See* P. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 58 (1971) [hereinafter cited as DE FUNIAK]; Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20 (1967).

32. *See* Morrow, *Matrimonial Property Law in Louisiana*, 34 TUL. L. REV. 3 (1959).

33. *See* DE FUNIACK, *supra* note 31, at § 58; Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20 (1967).

34. DE FUNIAK, *supra* note 31, at § 135.

35. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-201 (1956); CAL. CIV. CODE § 5133 (West Supp. 1971); IDAHO CODE ANN. § 32-916 (1963); LA. CIV. CODE ANN. arts. 2325, 2332 (West 1971); NEV. REV. STAT. § 123.010 (1968); N.M. STAT. ANN. § 57-2-6 (1953); WASH. REV. CODE ANN. § 26.16.120 (1958).

36. W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 238 (1965).

37. *See* Clay v. United States, 161 F.2d 607 (5th Cir. 1947).

It should be noted that the power to enter into an agreement creating a conventional community within a community property system is recognized in all of the community property states with the exception of Texas.[38] It is the unqualified doctrine in Texas that prospective spouses cannot antenuptially contract in order to circumvent the community property laws.[39] The Texas position is based upon a state statute which provides that "[p]arties intending to marry may enter into such stipulations as they may desire, provided they be not contrary to . . . some rule of law . . . ."[40] Texas courts reason that antenuptial contracts attempting to alter the community property laws fall within this prohibition.[41] This reasoning has met with strong criticism, and one writer offers the stinging suggestion that "[t]his irrational rule was not only ill-considered when adopted, but has also been erroneously cited as authority for some of the most fatuous cases in Texas jurisprudence."[42] Despite such criticism, however, the doctrine is well entrenched in Texas law and antenuptial alteration of the community property regime is an impossibility in that state.

Even though the majority of community property states allow the antenuptial alteration of community property rights, there have been few antenuptial contracts involved in litigation which have aimed at accomplishing this goal. In fact, the use of the antenuptial agreement to circumvent the community property regime has been attempted more often in Texas, where it is illegal, than in the other six community property states, where it is not prohibited by statute. In those other six states, only four cases involving such agreements have been reported.[43] In two of these four cases, the issue contested was collateral to the question of enforcement of the antenuptial contract.

Of the two decisions directly on point, one involved the contractual stipulation that salaried income would remain separate, while the other decision involved a contract provision aimed at keeping real property and its income separate property. In the California case of *Mitchell v. Tibbetts*,[44] the prospective wife had children from a prior marriage to whom she wanted to devote her entire income. There was also a desire on the part of the prospective husband to neither adopt these children nor support them. To resolve this situation the parties entered into an antenuptial

38. *See* W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 238 (1965).

39. *See, e.g.*, Burton v. Bell, 380 S.W.2d 561 (Tex. 1964); King v. Matney, 259 S.W.2d 606 (Tex. Civ. App. 1953); Texas Bldg. & Mortg. Co. v. Rosenbaum, 159 S.W.2d 554 (Tex. Civ. App. 1942), aff'd, 140 Tex. 325, 167 S.W.2d 506 (1943); Chandler v. Alamo Mfg. Co., 140 S.W.2d 918 (Tex. Civ. App. 1940); Gorman v. Gause, 56 S.W.2d 855 (Tex. Civ. App. 1933).

40. TEX. REV. CIV. STAT. art. 4610 (Supp. 1967).

41. *See, e.g.*, Gorman v. Gause, 56 S.W.2d 855 (Tex. Civ. App. 1933).

42. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 68 (1967).

43. Clay v. Unites States, 161 F.2d 607 (5th Cir. 1947); Mitchell v. Tibbetts, 131 Cal. App. 2d 480, 280 P.2d 860 (1955); Succession of Hollander, 208 La. 1038, 24 So.2d 69 (1945); Hamlin v. Merlino, 45 Wash. 2d 851, 272 P.2d 125 (1954).

44. 131 Cal. App. 2d 480, 280 P.2d 860 (1955).

contract providing that the wife's earnings would remain her separate property. The court held that the parties had the power to validly enter into such a contract and indicated that this same contract could have been used to determine the status of the husband's income. The court displayed a favorable view toward this use of the antenuptial contract, via its broad rule that a husband and wife may agree before marriage that their future earnings be separate property.

Although *Mitchell* recognized the use of the antenuptial contract to alter the concept of community property, it failed to establish the requirements for valid execution of the contract. However, two requirements for such contracts were imposed in the Washington case of *Hamlin v. Merino*.[45] In *Hamlin*, the prospective marriage partners contractually provided that any income from their existing properties and any property subsequently taken in either name would be separate rather than community property. The enforceability of this contract was put in issue when the deceased wife's administrator claimed that all the property acquired after the marriage became community property. The court observed that generally such contracts are valid and within the contracting power of the parties. However, the court, apparently analogizing to antenuptial contracts that alter inter-spousal property rights upon death, took refuge in the "confidential relationship" doctrine. The court said that, due to the confidential relationship existing between engaged parties, the husband must prove that his prospective wife fully understood the nature and significance of the contract and that she freely and voluntarily entered into it. As is often the case, the surviving husband was unable to meet this burden and the antenuptial contract was held void.

Regardless of the absence of definitive decisions, at least it can be observed that there have been too few attempts to use the antenuptial contract as a means of altering or abrogating community property rights. There is a general state of amenability to such arrangements which private parties have not sufficiently explored.

III. STIPULATING RIGHTS AND LIABILITIES UPON DIVORCE VIA THE ANTENUPTIAL CONTRACT

A. *Introduction*

A man and woman, about to be married, are well aware of the prevailing divorce rate. With this in mind, they may attempt to provide for this contingency in an antenuptial contract by settling their respective rights and liabilities.[46] However, such provisions of the antenuptial con-

45. 45 Wash. 2d 851, 272 P.2d 125 (1954).

46. The provisions of this agreement, as revealed in a survey of the reported cases, may be in any one of the following forms:

(1) If the wife files for divorce, she forfeits all rights in the husband's property and all right to alimony.

(2) If either the husband or wife files for divorce, the moving party forfeits all interest in the marital property and in the separate property of the other.

tract are invariably voided when presented to those courts which apply the "contrary-to-public-policy" rule.[47] This rule, applied more vigorously by earlier decisions, is as follows, "any ante-nuptial bargain that looks toward, provides for, facilitates, or tends to induce a separation or divorce after marriage, is contrary to public policy and void."[48] Apparently, this rule began as a rebuttable presumption. Now, however, the rule seems to have become an absolute one which is applied to any antenuptial agreement contingent upon divorce.[49] This public policy rule is used regularly as a basis for voiding an antenuptial contract contingent upon divorce, with total disregard for whether or not the agreement actually encourages divorce. The reasons for the public policy rule's long tenure in the courts are two-fold. First, there are a few instances in which the antenuptial contract has been used for despicable purposes and secondly, these instances have been met with strong and emotional statements by judges. The public policy rule had one of its most vigorous applications in an early Colorado case where the court, faced with an antenuptial contract providing for an uncontested divorce without alimony in exchange for payment to the wife of $100 per year, said that the instrument was a "wicked device" and "an attempt . . . to legalize prostitution . . . ."[50] Although this particular contract illustrated a specific evil, later courts have used this language to justify striking down *all* antenuptial contracts contingent upon divorce.

B. *Arguments Used to Support Application of the Public Policy Rule*

A survey of antenuptial cases reveals that courts vary in their reasons and arguments for invoking the public policy rule to void antenuptial contracts that look toward divorce. Some of the reasons are:

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(3) If the wife files for divorce, she forfeits all rights to any alimony from the husband.
(4) If the marriage ends in divorce, the wife receives $——— in settlement of all her rights in the husband's property.
(5) If the marriage ends in divorce then the wife receives $——— in settlement of all her rights to alimony.
(6) If the marriage ends in divorce then the wife receives $——— as support and no interest in the husband's property.
(7) If the marriage ends in divorce the wife receives no alimony and no interest in the husband's property.
(8) If the marriage ends in divorce, neither party can claim any interest in the separate property of the other.
(9) Upon marriage, a trust will be set up by the husband with the income to be payable to the wife and the corpus to go to her upon the husband's death; but in the event of divorce, the corpus returns to the husband.
(10) If the marriage ends in divorce the wife receives $——— in lieu of all her rights in the husband's property. If the marriage lasts until the death of the husband then the wife receives $——— in lieu of all her rights in his property.

This list of possible provisions is by no means exhaustive, but is merely offered as a picture of some honest attempts by mature parties to provide for the divorce contingency.

47. Hereinafter referred to as the "public policy rule."

48. 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 90-27 (1964).

49. One is tempted to describe this as a per se rule.

50. *In re* Duncan's Estate, 87 Colo. 149, 152, 285 P. 757, 757 (1930).

(1) To allow parties to premaritarilly contemplate divorce under a written contract is legally improper since it is contrary to the concept of marriage in our society.

(2) There is a hesitancy on the part of the courts to give the marriage relationship any of the incidents of an ordinary contract. There seems to be a basic fear that allowing parties to alter the rights and liabilities incident to divorce will cause the institution of marriage to lose its dignity and sacredness.[51]

(3) Enforcement of antenuptial contracts would open the door for spouses to determine contractually even the most minor incidents of their marriage relationship. The fear is that to uphold such contracts would create an endless field for controversy and bickering. Such matters as the allowance the husband or wife may receive, the number of dresses a wife may own or the places where they will spend their vacations would be proper subjects for antenuptial contracts.

(4) If a husband is allowed to limit his liability in the event of divorce, there is a possibility that the wife will have to be supported by the state.

(5) Many courts approach the application of the public policy rule by saying that if the husband's liability upon divorce is limited or completely abrogated by antenuptial contract, then such an agreement encourages the husband to leave his wife, and thus facilitates divorce. The apparent theory is that such a contract makes it profitable for the property-owning spouse to abandon his marriage partner.[52]

(6) When the antenuptial contract provides that if either party files for divorce he forgoes all rights, even though it would seem to discourage divorce, courts will also void this agreement under the public policy rule. The argument here is that such an agreement places an innocent party, *i.e.*, the wife, in a position where she would be forced to endure conduct which would constitute grounds for divorce because of fear that the commencement of a divorce action would deprive her of property rights and a means of support.[53]

(7) There is a belief among some courts that the settlement of divorce rights is a task that has historically been the job of equity courts. Thus, there is a basic opposition to any preemption in the area by the prospective spouses themselves.[54]

C. *Arguments in Support of Abandoning the Public Policy Rule*

There are several reasons why the public policy rule should not invalidate all antenuptial contracts that look toward divorce.

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51. *See* Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950).

52. *See, e.g.*, Kalsem v. Froland 207 Iowa 994, 222 N.W. 3 (1928); Englund v Englund, 286 Minn. 227, 175 N.W.2d 461 (1970); Appleby v. Appleby, 100 Minn. 408, 111 N.W. 305 (1907).

53. *See* Sanders v. Sanders, 40 Tenn. App. 20, 288 S.W.2d 473 (1956).

54. *See, e.g.*, Posner v. Posner, 206 So.2d 416 (Fla. 3d Dist. 1968), *quashed*, 233 So.2d 381 (Fla. 1970); Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950).

(1) The first argument against the use of the public policy rule is sociological. As early as 1927, a well known sociologist observed that "a woman's right to financial support from the husband when she has divorced him has been taken for granted so long that we have assumed its justice as a matter of course and it was developed during the days when matrimony was the only vocation of women."[55] Today, matrimony is not the only vocation of women, and our entire nation is becoming increasingly aware of women's rights with respect to any area of vocational endeavor. It is suggested that adult parties today, prior to marriage, should be allowed to provide for the question of alimony without having that provision declared void per se as a violation of public policy. A further aspect of this sociological argument against the public policy rule is that to facilitate the divorce process does not mean there will be an automatic increase in the divorce rate. This argument is based upon the sociological observation that the easiest divorce law by no means produces the greatest number of divorces.[56]

(2) The public policy rule manifests a basic discrimination between the divorcee and the widow. The courts applying the public policy rule maintain that the state has an interest in seeing that a husband performs his obligations of supporting his wife. Of course, most states also have an interest in providing for the widow to the extent that they provide her by statute with a fraction of his estate. Yet, public policy approves antenuptial contracts limiting the dower obligation while voiding those contracts limiting alimony rights.[57] It seems unfair to assert that the support of a divorcee is of more concern to the state than that of a widow. However, if that is not the case, then antenuptial contracts which are prima facie valid in respect to the widow should be equally valid when they concern the divorcee, as long as the ascertainable and reasonable effect of the agreement is not to promote the dissolution of the marriage. The courts should recognize that with divorce such a commonplace fact of life, many prospective marriage partners might want to consider the disposition of their property and the alimony rights of the wife in the event their marriage should fail.[58]

(3) Suppose a wealthy woman wants to marry a low-income man who is paying alimony to a previous wife and who has an invalid mother to support. They want to get married but the man is hesitant because he feels a duty to maintain his already existing obligations to his ex-wife and mother. He is further hesitant because, having had firsthand experience, he is afraid that this second marriage may end in divorce, thus burdening him with a second alimony obligation. In order to solve this dilemma, the prospective wife, in no need of support by the husband,

55. E. GROVES, SOCIAL PROBLEMS OF THE FAMILY 156 (1927).

56. *See* B. RUSSELL, MARRIAGE AND MORALS 223 (1929).

57. *See, e.g.*, McClain's Estate v. McClain, 133 Ind. 645, 183 N.E.2d 842 (Ct. App. 1962) (court declared divorce provisions void while enforcing death provisions).

58. *See* Posner v. Posner, 233 So.2d 381, 384 (Fla. 1970).

waives, by agreement, any possible future claim to alimony. By operation of the public policy rule, however, the arrangement would be void per se. It is arguable that, in this situation, the rule itself is against public policy since it tends to discourage marriage.[59]

(4) By adopting a narrow construction of the public policy rule, the inherent weaknesses of the rule can be seen. "[U]nder no circumstances may the parties before marriage come to a valid agreement concerning the wife's rights or the husband's obligations in case the marriage is terminated by the courts."[60] The rule can be stated even more narrowly: "[U]nder no circumstances may the parties contemplating marriage recognize divorce as a possibility . . . and make financial provision for that contingency."[61] Wise public policy would seem to disfavor such uncompromising statements which void any antenuptial agreement even mentioning divorce.

(5) In relationships other than marriage, contracts defining the expectations and responsibilities of the parties promote stability. The clarity of contracts in the commercial world should be available in antenuptial agreements. If not, there should at the very least be no presumption that antenuptial agreements tend to promote discord in marriage. While commercial contracts defining the parties' rights are encouraged by the courts, an antenuptial agreement making financial provision for the wife in the event of divorce is held *malum in se* and is outlawed, no matter how generous and regardless of the circumstances.

(6) Assume a husband and wife enter into an antenuptial contract providing for certain rights upon divorce. The contract also provides that upon the husband's death, the wife is to receive from his estate only what he leaves her in his will. The thought might occur to the wife that she takes a chance of receiving nothing by awaiting her husband's death. Thus, she will sue for divorce and alimony knowing that the divorce provisions of the antenuptial contract will not be enforced against her.[62] In this fact situation, the public policy rule, which makes antenuptial contracts invalid per se, is itself conducive to divorce.

(7) The public policy rule manifests a judicial discrimination between married and unmarried women. It is widely held that *after* marriage a husband and wife can enter into a separation agreement settling alimony and property rights contingent upon divorce. These agreements, if free from fraud, may be sustained by the courts and made a part of a divorce decree.[63] There would seem to be no reason why public policy should protect the unmarried woman more than the married woman by

59. Posner v. Posner, 206 So.2d 416, 422 (Fla. 3d Dist. 1968), *quashed*, 233 So.2d 381 (Fla. 1970).

60. Fricke v. Fricke, 257 Wis. 124, 129, 42 N.W.2d 500, 503 (1950).

61. *Id.* at 125, 42 N.W.2d at 504 (1950).

62. *See* Fricke v. Fricke, 257 Wis. 124, 42 N.W.2d 500 (1950).

63. *See, e.g.*, Miller v. Miller, 149 Fla. 722, 7 So.2d 9 (1942).

holding that alimony provisions in antenuptial contracts are void, while such provisions may receive judicial affirmation in postnuptial agreements.

D. *Alimony Versus Property Settlement*

There is a basic ambiguity in the application of the public policy rule which permeates the entire area of divorce. This ambiguity consists of the differentiation between support or alimony, and property settlement. So pronounced is this ambiguity in the area of antenuptial contracts that the distinction between property settlement and alimony is difficult to make. If an antenuptial contract settles the division of property between spouses in the event of divorce, is it invalid under the public policy rule? Although the answer to this question is not free from doubt, the majority of courts that apply the public policy rule will void provisions regarding both alimony and property settlement.

The confusion in this area had an early beginning. In an 1896 Supreme Court of Kansas case,[64] an antenuptial contract provided that upon divorce there was to be no alimony and no right to the property of the other spouse. The court held that because this contract waived the husband's duty to support the wife, it was void. The court decreed that the wife should receive $1,770 in cash and 120 acres of the husband's property, without discussing the validity of the portion of the agreement dealing with property settlement. By failing to define clearly the award as alimony or alimony plus a property settlement, the court impliedly held the provision was void without attempting to classify it. This lack of clarity allowed later courts to hold that an antenuptial contract, whether it provides for alimony and/or property settlement upon divorce, was void as against public policy. Thus, many of the problems involving alimony and property settlements have stemmed from what the courts have failed to say rather than from what they have said.

Some courts have added to the uncertainty by their broad application of the public policy rule. One such court, when voiding an antenuptial contract containing both alimony and property settlement provisions, held: "[I]t is the rule in this court that an antenuptial contract which purports to limit the *husband's liability* in the event of separation or divorce is void as against public policy."[65] However, the court failed to discuss any distinctions between alimony and property settlement provisions. The contract in dispute provided that upon divorce, the wife would receive $2,500 as a final division of the estate in lieu of alimony. The same provision was made in the event the husband died. The court gave the wife $100 per month alimony and $20,184.47, partially representing a "distribution of a share of property,"[66] notwithstanding the husband's argument that the contract, even though void as to alimony, should have been valid

64. Neddo v. Neddo, 56 Kan. 507, 44 P. 1 (1896).

65. Werlein v. Werlein, 27 Wis. 2d 237, 240, 133 N.W.2d 820, 822 (1965) (emphasis added).

66. *Id.* at 238, 133 N.W.2d at 821.

as to the property settlement. Thus, the court at least impliedly held that an antenuptial contract, whether limiting alimony or stipulating property settlement, was void when tested by the public policy rule.

Other courts have engendered uncertainty by using the public policy rule to support the theory that prospective spouses have no right to even contemplate divorce in a contract. This approach has been used in those decisions which hold that, under the public policy rule, any antenuptial contract is void which "facilitates or otherwise *contemplates* . . . divorce or separation."[67] Under the broad scope of the word "contemplate," courts have treated alimony and property settlement provisions alike when found within an antenuptial contract.[68] This same treatment for alimony and property settlement provisions is further complicated by such broad statements of the public policy rule as:

> Antenuptial contracts, to be valid, must be made in contemplation of the marriage relation subsisting until the parties are separated by death. . . . If such an agreement is made in contemplation, at the time of its execution, that the parties, or either of them, expect to be divorced, then such an agreement is void *ab initio*.[69]

It should be noted that much of the uncertainty in this area seems to be inherent in antenuptual contracts. These agreements lend themselves to the lack of differentiation in judicial treatment that is accorded alimony and property settlement provisions. Generally, the provisions stipulating alimony and property division are so interconnected that it is usually simpler to void the entire agreement than to recognize any distinction between the provisions. For example, antenuptial contracts often state that if there is a divorce, the wife is to receive a set payment in lieu of alimony and all rights in the husband's property. Separating these two provisions and determining their legal effect is obviously difficult. With this difficulty in mind, it might be argued that an antenuptial contract can easily receive judicial approval if it deals only with the property settlement and refrains from any mention of alimony. However, antenuptial contracts consisting solely of a provision governing the division of property upon divorce are rare. In *Sanders v. Sanders*,[70] the Supreme Court of Tennessee was asked to enforce an antenuptial contract which provided that if either spouse filed for divorce, he or she forfeited all his rights in the marital property. While the *Sanders* court was presented with the opportunity to resolve the ambiguities surrounding the waiver of support as opposed to property settlements in antenuptial agreements, the court avoided clarification. Rather than upholding the clause waiving property rights upon divorce, the court further clouded the issue by deciding that the provision was

67. Annot., 70 A.L.R. 826, 826 (1931) (emphasis added).
68. *See, e.g.*, Oliphant v. Oliphant, 177 Ark. 613, 7 S.W.2d 783 (1928).
69. *Id.* at 625, 7 S.W.2d at 788.
70. 40 Tenn. App. 20, 288 S.W.2d 473 (1956).

valid only as to a spouse who files for divorce upon unreasonable grounds and in bad faith. In addition, *Sanders* leaves unanswered the question of what judicial treatment will be given an antenuptial contract which sets certain property rights upon divorce regardless of who the complaining spouse might be. Likewise, the decision implies that if an antenuptial contract provides for waiver of property rights by the spouse filing for divorce, and if that spouse does file in good faith, then such a contract is void.

While there have been cases which imply that an antenuptial property settlement provision should be enforced upon divorce, these decisions are also plagued by what the courts fail to say rather than by what they actually hold. In *Williams v. Williams*,[71] for example, the court was faced with an antenuptial contract providing that upon divorce the husband was to pay the wife $500 in settlement of all claims and demands. The court held that this provision was contrary to public policy insofar as the support was concerned. Apparently the issue of alimony was the sole question before the court. However, by way of dictum, the court said: "It [the antenuptial contract] may be . . . perfectly valid in settling any rights which [the wife] acquired in the separate property of [the husband] by reason of the marriage."[72] The court in *Williams* failed to elaborate on this statement, however. Another case, *Motley v. Motley*,[73] also hinted that property settlement provisions should be upheld in antenuptial contracts contingent upon divorce. *Motley* involved an antenuptial contract in which the wife waived all alimony and support upon divorce. Although no property settlement was involved, the court, in voiding the agreement, stated: "The antenuptial agreement relied upon by the defendant [husband] herein is against public policy and is null and void in so far as it undertakes to relieve the defendant from the duty of supporting the plaintiff [wife]."[74] This language implied that had the contract dealt with property division, it would have been upheld. However, the full text of the contract did not appear in the opinion and, in its absence, one could not determine whether any of its provisions concerned property division.

The state courts of Wisconsin appear to have rendered the clearest decisions in this area. Wisconsin's position is that the public policy rule should be applied to any antenuptial contract contingent upon divorce regardless of whether it involves alimony or property settlement. The first case to authoritatively establish this as the rule in Wisconsin was *Fricke v. Fricke*.[75] The court in *Fricke* was asked to enforce an antenuptial contract calling for $2,000 to be paid to the wife upon divorce as a property settlement in lieu of alimony. In holding this contract void

71. 29 Ariz. 538, 243 P. 402 (1926).
72. *Id.* at 544, 243 P. at 404.
73. 255 N.C. 190, 120 S.E.2d 422 (1961).
74. *Id.* at 193, 120 S.E.2d at 424.
75. 257 Wis. 124, 42 N.W.2d 500 (1950).

under the public policy rule, the court stated: "An antenuptial contract which purports to limit the husband's liability in the event of separation or divorce . . . is void as against public policy."[76] The court remanded the case with directions that the lower court decide the wife's alimony and divide the property. The court had thus interpreted the phrase "husband's liability" in the above rule to encompass both alimony and property settlement.

Eight years later the Supreme Court of Wisconsin reviewed its application of the public policy rule in *Fricke*. In *Caldwell v. Caldwell*,[77] the defendant husband asked the court to adopt the dissenting opinion in *Fricke* repudiating the public policy rule. While refusing to abandon the rule, the court did observe that "[w]hile some members of the court as now constituted would prefer the views expressed in the dissent [in *Fricke*] if the matter were an original proposition, we do not consider ourselves at liberty to reject the considered decision of our predecessors . . . ."[78] Thus, the Wisconsin Supreme Court found itself chained by precedent. As late as 1967, the courts of Wisconsin made it clear that whether the contract deals with alimony or property settlement it will be voided under the public policy rule. In *Strandberg v. Strandberg*,[79] the court, citing the *Fricke* decision, said the rule in Wisconsin was that "an antenuptial agreement is against public policy and void in respect to a division of estates in the event of divorce or legal separation . . . ."[80]

There has been a good deal of antenuptial contract litigation in Kansas, a state which has attempted to distinguish support and property provisions within antenuptial contracts. Despite its attempts, Kansas' decisions regarding antenuptial contracts still contain uncertainties and ambiguities. For example, in *Fincham v. Fincham*,[81] the court had before it an antenuptial contract providing that if the husband and wife separated, the husband was to pay the wife $2,000 in complete settlement of every claim the wife might have against the husband by reason of the marriage. The agreement further stipulated that the agreement should be accepted by any court as a full and complete settlement and satisfaction of the property rights of the husband and wife. The contract ended with a provision that all rights the wife might have in the husband's property were to be extinguished upon payment of the $2,000. In response to the presentation of the above agreement, the court said that the rule in Kansas was:

"[C]ontracts, made either before or after marriage, the purpose

76. *Id.* at 129, 42 N.W.2d at 502. The dissent argued that the public policy rule should be abandoned in favor of approaching each antenuptial contract on a fact by fact basis. *See also* Werlein v. Werlein, 27 Wis. 2d 237, 133 N.W.2d 820 (1965).

77. 5 Wis. 2d 146, 92 N..2d 356 (1958).

78. *Id.* at 156, 92 N.W.2d at 361.

79. 33 Wis. 2d 204, 147 N.W.2d 349 (1967).

80. *Id.* at 207, 147 N.W.2d at 351.

81. 160 Kan. 683, 165 P.2d 209 (1946).

> of which is to fix property rights between a husband and wife, are to be liberally interpreted to carry out the intentions of the makers, and to uphold such contracts where they are fairly and understandably made, are just and equitable in their provisions and are not obtained by fraud or overreaching. . . ." [S]uch contracts are not against public policy unless the terms of the contract encourage a separation of the parties.[82]

Thus, the Kansas Supreme Court, at least ostensibly, had abandoned the public policy rule in favor of judging the antenuptial contract dealing with property settlement under a two-pronged test: (1) A fair, just and equitable agreement which is not obtained by fraud or misunderstanding; and (2) an agreement that does not encourage the separation of the parties.

After stating its test, the court in *Fincham* proceeded to void the contract in question because it encouraged separation. The pronounced theory was that inevitably the husband would have realized that he could dispense with his marriage at the cost of only $2,000. This reasoning points to one of the principal problems with the *Fincham* test. It would be an insurmountable challenge to draft an antenuptial contract settling property rights in such terms that it would not be profitable, in a pecuniary sense, for one spouse or the other to seek a divorce. Practically every conceivable antenuptial contract looking toward financial settlement would, in this sense, encourage divorce. The test of determining what encourages divorce echoes the sentiments of the Kansas Supreme Court which, as early as 1896, stated that such encouragement is present if the provision makes it "productive of profit to the party having the greater amount of property."[83] The only way that a prospective couple can meet the *Fincham* test is to strike upon some mysterious formula that would divide their property just as the divorce court would divide it. Since compliance with this test can never practicably be achieved, the effect of *Fincham* is just another application of the public policy rule voiding all antenuptial contracts contingent upon divorce. This evaluation of *Fincham* has found support from at least one writer:

> [S]ince society has a vital interest in the preservation of marriage, any antenuptial bargain that looks toward, provides for, facilitates, or tends to induce a separation or divorce after marriage, is contrary to public policy and void. Thus any provision in an antenuptial agreement for alimony or a *property settlement* in case the marriage breaks up is unenforceable.[84]

Another difficulty with *Fincham* is that the antenuptial contract in

82. *Id.* at 687, 165 P.2d at 212, *quoting In re* Estate of Cantrell, 154 Kan. 546, 551, 119 P.2d 483, 486 (1941).

83. Neddo v. Neddo, 56 Kan. 507, 512, 44 P. 1, 2 (1896).

84. 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 90-27 (1964) (emphasis added).

question there made no mention of waiver of support. Throughout two-thirds of the opinion, the court wrote as though it were formulating a test for the validity of an antenuptial contract regulating the division of property upon divorce. However, in applying the "fair and equitable" portion of its test, the court allowed the old ambiguity between support and property settlement to undermine what had begun as a bold step in the right direction: "Moreover, if the separation provision is declared to be valid he may without just cause abandon her and for the wholly inadequate sum of $2000 relieve himself of his personal marital duty to . . . support and maintain her . . . ."[85] Thus, by means of this unnecessary dictum, the court allowed the question of alimony to cloud the resolution of solely a property settlement issue.

A final problem with *Fincham* is that, in support of its holding making the public policy rule inapplicable to antenuptial contracts stipulating inter-spousal property rights upon divorce, the court referred to a collection of eleven cases. However, these cases did not support *Fincham's* holding, since they all dealt with antenuptial contracts concerning property settlements upon death, and *not* with antenuptial contracts relating to property settlements upon divorce. This distinction is important because practically every jurisdiction has held antenuptial contracts settling property rights upon death valid if fair, equitable and free from fraud, while denying validity to those same contracts if they are contingent upon divorce. Thus, the Kansas court, despite its attempt to do otherwise, developed a test unsupported by precedent and which reaffirmed the age-old public policy rule. What promised to be an answer to the confusion in antenuptial contract law between support and property settlement simply missed its mark.

The chief difficulty with the *Fincham* holding was recently pointed out in *In re Cooper's Estate*.[86] There the judge made the following observation about the *Fincham* test: "The difficulty which arises in connection with the application of the foregoing rule is when an agreement can be said to invite, facilitate, or encourage divorce."[87] The court in *Cooper* recognized the difficulty in answering this question and pointed to at least two instances in which antenuptial contracts definitely encouraged divorce: (1) when the agreement obligated one spouse not to defend or contest a divorce suit by the other spouse; and (2) when the agreement obligated one spouse to sue for or procure a divorce. If there are ever any instances which would justify application of the public policy rule, these two hypothetical provisions constitute such instances.

Discussion of the public policy rule would be incomplete without suggesting a solution for the problems presented by the rule. The first step is for a judicial review of the policy behind the public policy rule. If the

85. 160 Kan. at 689, 165 P.2d at 213.
86. 195 Kan. 174, 403 P.2d 984 (1965).
87. *Id.* at 180, 403 P.2d at 988.

policy is simply that parties should not take upon themselves the prerogative of equity and agree to any settlement contingent upon divorce, then the application of the rule to antenuptial contracts settling property rights upon divorce is correct. However, if the policy is to adequately provide for divorced women, then courts should recognize that agreements as to alimony and those as to property right should be treated differently. If the courts must adhere to the public policy rule, then it should be applied only to alimony agreements with divorce as a contingency. When prospective spouses agree upon division or waiver of property in the event of divorce, this agreement should not be automatically voided. The agreement should be upheld if it meets the test of good faith and full disclosure applied to similar property agreements that are contingent upon death.[88]

It should be recognized that the basic difficulty with the application of the above approach is that few antenuptial contracts deal solely with property division upon divorce. Thus, the question is immediately encountered as to how the courts will approach the following antenuptial contract clause: "In the event of divorce the husband will give the wife $500 in full satisfaction of all her rights to alimony and in lieu of any rights to the husband's separate property." As the majority of courts now stand, this entire agreement would automatically be voided. However, if the alimony and property division provisions can be distinguished, the agreement presents a definite problem. One solution, assuming that spouses cannot contract as to alimony, would be to void the alimony provision and enforce the property rights provision by giving the wife a $250 lien on the husband's separate property, provided there was no fraud in the execution of the agreement. If the foregoing agreement provides for $500 in alimony and no property rights for the wife, then the husband could, in the absence of fraud, enforce the waiver of property rights provision to prevent the wife from receiving any portion of the husband's separate property.

In addition to the wording of a particular antenuptial contract, there is another problem inherent in the recognition or non-recognition of these agreements. Due to the broad powers of equity courts in this area, usually by statute, a court can order a transfer of property from the husband to the wife in lieu of alimony.[89] Furthermore, as a practical matter, the divorce decree often does not clearly differentiate between property division and support.[90] Thus, even if the public policy rule is abandoned as it applies to property division agreements contingent upon divorce, an equity court would still have the power to circumvent this approach by simply disguising property division in the form of alimony.

The foregoing problems are reasons why the courts should abandon the public policy rule as to both alimony and property division provisions.

88. *See* section IV, B, *infra*.

89. *See* H. CLARK, LAW OF DOMESTIC RELATIONS 449 (1968).

90. *See* C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 913 (1966).

The courts should allow such provisions, subject only to the test of whether the provision for the wife is fair; and if not fair, whether there is fraud, misrepresentation or overreaching by the husband.

E. *The Movement Away from the Public Policy Rule*

The next consideration is the movement away from the rule that any antenuptial contract determining rights upon divorce is void per se as against public policy. It should be recognized at the outset, however, that some courts refuse to even reexamine the rule, much less overrule it.[91]

Only one case, *Hudson v. Hudson*,[92] squarely upholds an antenuptial agreement providing for no alimony upon divorce, thereby completely disregarding the public policy rule. However, the court's reasoning in *Hudson* has not been followed by any other court, including those in the same jurisdiction. The failure to adopt Hudson's reasoning indicates that the public policy rule will not be *directly* overruled.[93] Rather, as judicial nonacceptance of *Hudson* illustrates, the public policy rule can only be changed by a more indirect approach.

The first decision to pierce the public policy rule was *Sanders v. Sanders*.[94] In *Sanders*, an antenuptial contract provided that if either spouse filed for a divorce, he or she forfeited all interest in the marital property. The most promising part of the *Sanders* decision was the court's apparent refusal to automatically apply the public policy rule without first weighing the facts and circumstances. The court viewed its job as having "to determine whether it [the antenuptial contract] violates the public policy rule. To do this, it is proper to consider the purposes of the contract, and the situation of the parties when it was made."[95] These were encouraging words to bolster the assault on the public policy rule. However, the *Sanders* court neither upheld the contract nor voided it. Rather, the court looked at "the intention of the parties" and held that the parties actually intended the agreement to be enforceable only if the divorce was not prosecuted in good faith and upon reasonable grounds. The court drew an analogy between the divorce provision and a will provision denying benefits to one who contests the will. The rule in that situation provided that the forfeiture provision was valid only as to one who contested in bad faith and with unreasonable justification.[96] The limited scope of *Sanders*, therefore, was that if there was an antenuptial agreement waiving property rights contingent upon divorce, the agreement would only be effective if the divorce action was prosecuted in bad faith. The importance of *Sanders* lay not in its substantive outcome, but rather in the fact that it

91. *See, e.g.*, Werlein v. Werlein, 27 Wis. 2d 237, 133 N.W.2d 820 (1965).

92. 350 P.2d 596 (Okla. 1960).

93. *See* Norris v. Norris, 174 N.W.2d 368 (Iowa 1970). The court took special effort to point out that *Hudson* did not overrule the public policy rule but only ignored it.

94. 40 Tenn. App. 20, 288 S.W.2d 473 (1955).

95. *Id.* at 33, 288 S.W.2d at 478.

96. *See* 57 AM. JUR. *Wills* § 515 (1948).

provided a precedent upon which it could be argued that an antenuptial contract dealing with divorce rights was *not* automatically void.

The most consistent and dramatic judicial departure from the public policy rule has come in the State of Florida, where antenuptial contract litigation has sharply increased in recent years.[97] The pioneer case which served as the point of departure from the public policy rule was *Del Vecchio v. Del Vecchio*.[98] It is odd that *Del Vecchio* should be the leading case in this area, since the suit involved an antenuptial contract death provision and had absolutely nothing to do with divorce rights. However, the importance of the case was in the test which the court formulated. For an antenuptial contract to be upheld, one of the following three alternative requirements has to be met: (1) a fair and reasonable provision for the wife; (2) a full and frank disclosure to the wife of the husband's worth before signing the agreement; or (3) a general and approximate knowledge by the wife of the prospective husband's property. In actuality, *Del Vecchio* simply restated the long applied test as to antenuptial contracts contingent upon death. Nevertheless, *Del Vecchio* assumed great importance, not because of what the court held, but rather because of what later courts have construed the opinion to mean. If the *Del Vecchio* court still approved of application of the public policy rule to antenuptial contracts stipulating divorce rights, then it should have made this view more explicit, because a subsequent Florida decision, *Lindsay v. Lindsay*, interpreted *Del Vecchio* to mean that "by implication . . . the parties may contractually determine alimony provisions in the event of separation or divorce . . . ."[99]

Although *Lindsay* justifiably strikes a blow at the obsolete public policy rule, it is submitted that *Lindsay* misinterpreted the *Del Vecchio* decision. In reaching its decision, the court in *Lindsay* relied on the following statement in *Del Vecchio*: "The basic criterion is . . . whether the provisions made for the wife will enable her to live after the dissolution of the marriage ties in a manner reasonably consonant with her way of life before dissolution . . . ."[100] The *Lindsay* court held that this language implied that parties can prenuptially stipulate divorce rights. However, there was nothing in *Del Vecchio* to suggest that the words "dissolution of the marriage ties" meant anything other than dissolution by death. Writing four years after *Lindsay*, one of the concurring judges conceded that the implication drawn by *Lindsay* was incorrect and that a husband and wife could not antenuptially contract as to alimony.[101] However, the Florida movement away from the public policy rule had gone too far to

97. *See* Murray, *Family Law, 1961-1962 Survey of Florida Law*, 18 U. MIAMI L. REV. 231, 251 (1963) (four-fold increase over a two year period).

98. 143 So.2d 17 (Fla. 1962).

99. Lindsay v. Lindsay, 163 So.2d 336, 337 (Fla. 3d Dist. 1964).

100. Del Vecchio v. Del Vecchio, 143 So.2d 17, 20 (Fla. 1962).

101. Posner v. Posner, 206 So.2d 416, 419 (Fla. 3d Dist. 1968), *quashed*, 233 So.2d 381 (Fla. 1970).

be stopped by a realization, four years too late, that the courts had started the movement via a judicial error.

There is another difficulty with *Lindsay* which needs examination. In referring to *Del Vecchio*, the court in *Lindsay* stated:

> By implication, the opinion holds that the parties may contractually determine alimony provisions in the event of separation or divorce, but the case does not decide the question of the validity of an ante-nuptial agreement wherein the future wife waives her right to alimony, support . . . and receives nothing in return.[102]

Upon the basis of this statement, it is submitted that the rule of *Lindsay* is that a husband and wife can antenuptially contract as to alimony upon divorce if the agreement meets the three alternative criteria of *Del Vecchio*, but they cannot antenuptially contract the complete waiver of alimony by the wife. Under the *Lindsay* decision, an antenuptial contract whereby the husband is to pay the wife $10 per month alimony could be valid if it meets the requirements of the *Del Vecchio* test. However, if the antenuptial contract provides that the husband is to pay the wife no alimony, then the provision would be automatically void under the public policy rule. There seems to be no justification for such a distinction.

The next step in the Florida departure from the public policy rule came in *Sack v. Sack*.[103] In *Sack*, the antenuptial contract provided that, in the event of divorce, "$1.00 shall be accepted by him or her in full settlement of all rights including rights of alimony, support and maintenance."[104] Thus, the stage was set for the District Court of Appeal, Third District, to lay to rest the uncertainty surrounding its decision in *Lindsay*. However, the lower court, instead of ruling on the divorce, improperly annulled the marriage. The *Sack* court seized upon the chancellor's error to remand the case and, thereby, avoided ruling upon the validity of the antenuptial contract provision. In remanding the case, however, the court sounded the death knell for the public policy rule: "If following remand of the cause the chancellor grants the husband a decree of divorce, then the question of validity of the contract . . . should be measured by the chancellor under the rule announced in . . . *Del Vecchio v. Del Vecchio*."[105] Thus, *Sack* was the first clear statement that an antenuptial contract regarding divorce was not automatically void but was to be judged on the basis of a three-alternative-criteria test.[106]

The final phase of the Florida story was a case which began its litigious course before 1968 and in 1970 received the final word of the

102. Lindsay v. Lindsay, 163 So.2d 336, 337 (Fla. 3d Dist. 1964).

103. 184 So.2d 434 (Fla. 3d Dist. 1966).

104. *Id.* at 435.

105. *Id.*

106. (1) fair and reasonable provision for the wife; (2) full disclosure to the wife of the husband's worth; or (3) general knowledge by the wife of the prospective husband's worth.

Supreme Court of Florida. *Posner v. Posner*[107] involved the validity of an antenuptial contract providing that, in the event of divorce, the husband was to pay the wife $600 per month in lieu of alimony and support. In the first appellate review of this case, the District Court of Appeal, Third District, was faced with the challenge of finally resolving the controversy. While the district court held that the contract was not binding, the strength of the decision was weakened by the variance among the members of the court as to what theory should be used in deciding the case. The majority concluded that the agreement was not binding, basing its position upon the theory that the awarding of alimony was within the sole and complete discretion of the chancellor, thus excluding the private agreement. The concurring opinion vigorously restated the old public policy rule. The concurring judge, contrary to the majority, believed that the court could make no election as to whether it would accept or reject the contract—it had to reject it. Finally, the dissenting judge mustered all of the arguments against the public policy rule to plead for its abandonment and for judicial enforcement of contracts that meet the *Del Vecchio* test.

Thus, the stage was finally set for the resolution of this issue by the Supreme Court of Florida. After giving judicial recognition to the time-honored public policy rule, the supreme court noted a change in both the attitude and habit of society reflecting the theory that divorce ought to be attained more freely or, at least, that the parties ought to be allowed to provide for such a contingency. Having recognized the need for a new test to judge antenuptial contracts dealing with divorce, the court held that an antenuptial contract regulating divorce rights is valid if it meets one of the three criteria of the *Del Vecchio* test, and if it appears that the divorce is prosecuted in good faith and on proper grounds.[108] The requirement of proper grounds appears not to refer to cases where a spouse sues for divorce and cannot prove his grounds, but rather to cases where the parties have contractually agreed that one will file for divorce upon an agreed ground, or that one spouse will not contest the divorce. Finally, the court further qualified its test by saying that the contract is valid only as long as conditions existing at the time the contract was made remain unchanged. Thus, it is always within the court's power to alter the terms of the contract upon a showing of changed circumstances.[109]

The question left unanswered by *Posner* is whether, by antenuptial contract, a wife can waive *all* rights to alimony. Under the rule of *Del Vecchio*, it would appear that she can; however, the decision in *Lindsay*

107. 206 So.2d 416 (Fla. 3d Dist. 1968), *quashed*, 233 So.2d 381 (Fla. 1970).

108. Posner v. Posner, 233 So.2d 381 (Fla. 1970). [Subsequent to the preparation of this article, *Posner* was again before the Supreme Court of Florida. This time, the ccurt invalidated the alimony provisions of the antenuptial agreement on the grounds that the husband concealed his true net worth at the time the agreement was executed. Posner v. Posner, 257 So.2d 530 (Fla. 1972).].

109. This is analogous to modification of alimony decrees. *See* FLA. STAT. § 61.14 (1971).

seems to indicate that the wife must receive something in return. In addition, the judicial power recognized in *Posner* of increasing or decreasing the alimony provision for the wife implies that she must be given some alimony. Thus, even under the new test announced in *Posner*, a wife would be unable to contractually waive all her rights to alimony. If the agreement complies with the *Del Vecchio* test, there appears to be no reason to invalidate it regardless of whatever provisions are made for the wife.

IV. Stipulating Rights and Liabilities Upon Death Via the Antenuptial Contract

The test used by the Florida courts to judge the validity of antenuptial contracts governing alimony is derived from the test applied by the majority of American courts to antenuptial contracts contingent upon death. The question remaining to be answered is how other jurisdictions will apply Florida's test regarding alimony if, in fact, they decide to adopt it. In determining how to apply the test, it is probable that the courts will observe its application to antenuptial contracts contingent upon death. Therefore, an analysis of the alteration of inter-spousal property rights upon death is necessary. The purpose of this analysis is two-fold: (1) To identify the rules governing the enforceability of these contracts; and (2) to determine any errors which the courts have made in this area, in order that courts will be able to avoid these pitfalls when applying this test to contracts altering inter-spousal rights upon divorce.

> All is prepared for sealing and for signing,
> The contract has been drafted as agreed;
> Approach the table, oh, *ye lovers pining*,
> With hand and seal come execute the deed![110]

The above legal aphorism presents a vivid picture of the execution of the antenuptial contract. The question is whether this portrait of two pining lovers, a scene foremost in the minds of judges operating in this area, is factual and valid today. The answer to this inquiry demands an examination of historical attitudes toward engaged parties to determine the true relationship between prospective spouses who are about to enter into an antenuptial contract.

In viewing antenuptial contracts which provide for the settlement of property rights upon death, courts invariably have begun with the realization that between persons in the premartimonial state there is a mystical, confidential relationship which anesthetizes the senses of the female partner. This confidential relationship attained its most dramatic expression in a nineteenth century Ohio decision in which the chancellor remarked: "What person so exposed to imposition as a woman, contracting personally with her intended husband, just on the eve of marriage, at a time

110. Alpert, *Gilbert's Law*, 75 CASE & COM. 44 (1970) (emphasis added).

when all prudential considerations are likely to be merged in a confiding attachment . . . ."[111] Having recognized the mental frailty of the infatuated woman, the courts have become her self-proclaimed protector whenever a prospective husband has attempted to alter her property rights. In view of the confidential relationship that is said to exist, the courts have imposed special duties upon, and presumptions against, the prospective bridegroom in his attempt to alter the property rights of his intended spouse. Before discussing these duties and presumptions, however, an examination of this so-called confidential relationship will be made to determine: (1) whether such a relationship realistically exists today; (2) assuming that it does exist, at what point it develops during the premarital relationship; and (3) what effect, if any, its existence should have upon the rules governing the recognition and enforcement of antenuptial contracts.

A. *The Confidential Relationship*

The confidential relationship doctrine requires the prospective husband to make full disclosure to his future wife of his assets and income. The policy justification for the doctrine is that a ruthless husband will have his prospective wife under such mental control that he will use this confidential relationship to dupe her into foregoing property rights incidental to the marriage.

In deciding whether this confidential relationship exists, the courts take basically three approaches. The older and more popular view is that this relationship exists between any two parties who are about to be married.[112] This approach can be termed a "confidential relationship by presumption." Courts adopting this approach apply it as an irrebuttable presumption, but in order to do so one must insulate himself from those fact situations wherein the prospective spouses are marrying solely for companionship. The presumption ignores those marriage arrangements in which the parties have full knowledge of what they desire from the other's estate and are far from being infatuated with each other. Thus, by invoking this presumption, the courts are ignoring the differences created by individual fact situations. While the presumption of a confidential relationship is definite and predictable, it is at the same time too indiscriminate in its automatic imposition of the confidential relationship burdens upon all who contemplate marriage.

A second approach used by courts can be termed a "confidential relationship by engagement." Courts employing this approach attempt to distinguish between premarital relationships which involve infatuation and more practical relationships by creating a presumption that a confidential relationship comes into existence upon the engagement of the par-

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111. Stilley v. Folger, 14 Ohio 610, 614 (1846).

112. *See, e.g.*, Potter v. Potter, 234 Ky. 769, 29 S.W.2d 15 (1930); Hartz v. Hartz, 248 Md. 47, 234 A.2d 865 (1967).

ties.[113] This is an attempt to improve upon the older, more rigid approach by recognizing that there is no confidential relationship between some espoused parties. However, the apparent improvement is based upon the erroneous reasoning that the relationship between espoused parties becomes confidential after engagement but not before. In other words, these courts recognize that there is no confidential relationship between parties who are not engaged. The effect of this approach is that the prospective spouse who persuades his marriage partner to contract prior to engagement avoids the consequences of the confidential relationship doctrine, while he who waits until after engagement is not so fortunate. In all probability, this approach originated at a time when an engagement, at least in the minds of most people, indicated an increased dependency between the prospective spouses. While such a presumption may have been valid at an earlier time, today it is anomalous to say that before a couple becomes engaged they deal with each other as strangers, but that after becoming engaged a confidential relationship automatically exists between them.

Another problem with this approach is deciding when an engagement occurs. Undoubtedly the moment of engagement was more identifiable at an earlier time in our society when it was accomplished by some overt act such as the gift of a ring, the presentation of a gift to show good faith, or the request of parental permission. However, in today's society, the essential acts which constitute an engagement are not so formalized and readily cognizable. This difficulty is reflected by the decisions of those courts which have sought to apply the theory that a confidential relationship exists after engagement. These courts have failed to present any adequate or comprehensive definition of when an engagement takes place. In fact, the majority of these courts have merely assumed that engagement was present.[114] One reason may account for this assumption and the resulting silence as to what constitutes an engagement. The question of the existence of an engagement has been traditionally viewed as a question of fact. Consequently, the resolution of this issue was within the authority of the trial courts. Although this procedure may have been quite proper, prospective couples who desired to contract before engagement were left in an uncertain legal position because reported appellate cases gave no guidelines or tests as to when an engagement occurred.

The only consistent attempt to resolve the problem of identifying an engagement has been made in Illinois and with little resulting success in terms of definiteness, clarity and predictability. In one of the earliest

113. *See, e.g.*, Martin v. Collison, 266 Ill. 172, 107 N.E. 257 (1914). In *In re* McClellan's Estate, 365 Pa. 401, 75 A.2d 595 (1950), the husband was eighty and the wife fifty-eight but the court still held that a confidential relationship came into existence automatically upon engagement.

114. *See, e.g.*, Dennison v. Dawes, 121 Me. 402, 117 A. 314 (1922); Bauer v. Bauer, 1 Ore. App. 504, 464 P.2d 710 (1970); Newton v. Pickell, 201 Ore. 238, 269 P.2d 508 (1954); Lightman v. Magid, 54 Tenn. App. 701, 394 S.W.2d 151 (1965); Batleman v. Rubin, 199 Va. 156, 98 S.E.2d 519 (1957).

cases, a marriage agreement was held to constitute an engagement.[115] Apparently, the Illinois court envisioned an agreement prior to the antenuptial contract as the act signifying engagement. Furthermore, before any confidential relationship could be presumed, the wife had to prove that there was an antenuptial agreement to marry. Although this test was quite clear in determining the existence of an engagement, it has been almost completely discarded by later Illinois cases.[116]

Although the majority of the applicable Illinois decisions have been consistent in holding that engagement is always more than the mere contemplation of marriage, the latest decision was completely contrary. After affirming the general rule that mere contemplation of marriage is not sufficient, the court in *Watson v. Watson*[117] held that the following facts constituted an engagement: (1) a statement by a friend that prior to the execution of the antenuptial contract the prospective bridegroom had requested his presence at the wedding and (2) a provision in the antenuptial contract that the parties contemplated a marriage ceremony soon to be solemnized.[118] Thus, the Illinois courts have been confused and uncertain as to when an engagement arises, simply because they have been attempting to give a legal definition to an occurrence in human affairs which defies precise identification.

The third approach used to determine when a confidential relationship exists can be called a "confidential relationship by facts." While the automatic presumption of a confidential relationship is predictable in its application, determining confidentiality by factual analysis is admittedly imprecise. Perhaps the best expression of the theory behind the factual approach is that "[e]ach case involving an antenuptial agreement differs from every other case and each case must be decided upon its own particular facts."[119] However, courts vary in determining what facts are sufficient to negate any confidential relationship between prospective spouses. Some courts refuse to recognize any confidential relationship when there is no love between the parties. This lack of love may manifest itself in facts ranging from an overt statement by the woman that she does not love the man[120] to circumstances from which it can be inferred that the parties entered the marital state as a matter of convenience.[121] Other courts make the existence of the confidential relationship dependent upon the ages of the parties. Some courts, for example, more readily declare a confidential relationship when the prospective husband is much older than

115. Martin v. Collison, 266 Ill. 172, 107 N.E. 257 (1914).

116. *See, e.g.*, Yockey v. Marion, 269 Ill. 342, 110 N.E. 34 (1915); Petru v. Petru, 4 Ill. App. 2d 1, 123 N.E.2d 352 (1954).

117. 5 Ill. 2d 526, 126 N.E.2d 220 (1955).

118. An earlier decision had stated that such a statement in the antenuptial contract is not evidence of engagement. Yockey v. Marion, 269 Ill. 342, 110 N.E. 34 (1915).

119. *In re* Koeffler, 215 Wis. 115, 120, 254 N.W. 363, 368 (1934).

120. *See* Rocker v. Rocker, 13 Ohio Misc. 199, 232 N.E.2d 445 (1967).

121. *See In re* Malchow, 143 Minn. 53, 172 N.W. 915 (1919).

the intended bride[122] while others, employing the concept of absolute age, are more apt to find the existence of a confidential relationship between a young couple than between a couple past middle age.[123]

All of the foregoing approaches as to what constitutes a confidential relationship are either needlessly rigid or are too dependent on individual fact situations at the cost of definiteness and predictability. The question left unanswered is whether these extremes can be avoided by the use of an approach which provides for both considerations equally. The courts should consider whether the confidential relationship doctrine actually serves any useful function today and, if it does, whether its advantages outweigh its disadvantages. Sustained thought about the reasoning behind the confidential relationship doctrine raises serious doubts as to its soundness. Unfairness can exist and disadvantages can occur with or without a confidential relationship. The uninfatuated woman, as well as the infatuated woman, may become the victim of overt fraud and misrepresentation. An even greater difficulty with the confidential relationship doctrine is that it involves an attempt to identify a state of mind and to apply rules of law based upon that identification. The division among the courts applying the doctrine seems to affirm that such an identification is beyond any court's ability.

Lastly, the idea of a confidential relationship in which the prospective husband has hypnotic power over his future wife is an unrealistic picture of today's premarital relationship. This observation is especially true among those people past middle age who utilize the antenuptial contract more than any other age group.[124]

B. *Good Faith and Full Disclosure—Benefits for the Bride and Burdens for the Groom*

The courts agree on the premise that "when an antenuptial contract is entered into . . . it is required of *each* [as a result of the confidential relationship] to make a frank, full, and truthful disclosure of their respective worth in real as well as personal property."[125] This judicial agreement leads to the assumption that, contrary to judicial reality, the burdens of the confidential relationship are applied equally to the prospective husband and the prospective wife.

One author, commenting upon antenuptial contract litigation in Illinois, has observed:

122. *E.g.*, Slingerland v. Slingerland, 115 Minn. 270, 132 N.W. 326 (1911) (prospective husband was sixty-seven and bride was twenty-three).

123. *See, e.g.*, Daniels v. Banister, 146 Ky. 48, 141 S.W. 393 (1911) (bridegroom sixty-three and bride fifty-nine—no confidential relationship). *See also In re* Groff, 341 Pa. 105, 111, 19 A.2d 107, 110 (1941), where both parties were past middle age and the court, holding no confidential relationship existed, remarked: "There is a marked distinction between a case like the present and that of a young couple just entering upon the vogage of life."

124. See Appendix A *infra.*

125. Levy v. Sherman, 185 Md. 63, 73, 43 A.2d 25, 29 (1945) (emphasis added).

> It is a matter of great gratification to me to find that there is no reported case in Illinois in which a husband contested the validity of an antenuptial agreement, which I believe is quite in keeping with the best tradition of men of Illinois. There are two conclusions that might be drawn therefrom, namely, (1) that the men of Illinois act with unswerving fidelity and loyalty to their wives and refuse to dispute with them even after they have departed this mortal world; or (2) the men of Illinois, after entering into a antenuptial agreement, deem it prophetically prudent to predecease their wives.[126]

With all due regard for the chivalry of Illinois men, other and more important conclusions may be drawn from the fact that cases in which the husband contests the antenuptial contract are practically nonexistent. One such conclusion is that women tend to live longer than men. Another is that many antenuptial contracts lack reciprocity, *i.e.*, the wife waives rights in the husband's estate but he does not waive his rights in her estate.

However, it is suggested that there is an important conclusion to be drawn from the fact that few husbands contest the antenuptial contract. This hesitation of husbands to contest the contract may be due, not to virtue and respect for deceased wives, but to the courts' placing a greater burden of proof upon the contesting husband than upon the wife. Although the duties of good faith and full disclosure are upon both parties, litigation reveals that these duties weigh more heavily upon the bridegroom than upon the bride. Even Professor Lindey, a noted authority on the subject, admits that the cases are not at all clear as to whether the fiduciary duty is mutual or unilateral.[127]

The first instance of inequality and unfairness in this area arises from the courts' recognition of a presumption in favor of the contesting wife. If the wife waives all her property rights in the contract or if the provision for her is inequitable, unjust, or unreasonable, then a presumption of fraud or nondisclosure arises. It then becomes the burden of the deceased husband's heirs to prove that there was disclosure.[128] This presumption often serves as a vehicle by which the wife is relieved of her awesome burden of proving that there was not full disclosure. In order to realize the broad implications of such a presumption, one need only observe that in practically every antenuptial contract the wife either waives all rights, or the provisions for her are minimal and otherwise unreasonable.[129] This result is obviously due to a natural desire on the part of the

126. Hayes, *Antenuptial Agreements*, 42 ILL. B.J. 212 (1953).

127. 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS 90-42 (1964).

128. *See* Levy v. Sherman, 185 Md. 63, 43 A.2d 25 (1945); *In re* McClellan's Estate, 365 Pa. 401, 75 A.2d 595 (1950); Lightman v. Magid, 54 Tenn. App. 701, 394 S.W.2d 151 (1965).

129. The determination of what constitutes a reasonable provision for the wife, the lack of which gives rise to the presumption, has been an added difficulty for the courts. Some courts have measured the reasonableness by a comparison to what the wife would

husband to pass his property on to his relatives. Therefore, in almost every instance of a litigated antenuptial contract, the wife, via this presumption, is given a powerful weapon. The existence of the presumption reveals a basic bias in favor of the interests of the prospective wife at the expense of the heirs of the husband.

Under the presumption of fraud or nondisclosure, the following hypothetical situation could easily occur: *M*, a 60-year-old widower, desires to marry *W*, a 55-year-old spinstress, but wishes to have his property go to his children by a former marriage. *W*, agreeing with *M*'s, wish, goes with *M* to the office of *M*'s elderly lawyer friend where the following interchange takes place:

Attorney: "Miss *W*, do you understand the agreement by which you waive all interest in *M*'s estate?"

Miss W: "Yes, I want the property to go to *M*'s children. Besides, I have some property of my own and I simply do not want his."

Attorney: "Do you understand that *M* is a wealthy man? If you wish, I will describe his assets."

Miss W: "That will be unnecessary. As I said, I have utterly no interest in his property. I am marrying *M* solely for love and companionship."

Upon *M*'s death, *W* decides that she is interested in sharing in *M*'s estate and attacks this agreement. Since the provision for her seems obviously unreasonable, *W* is assisted in her attack by the presumption that there was nondisclosure or concealment by *M*. The burden of proving full disclosure shifts to the children of *M*. Although the presumption is rebuttable, the burden of proof is staggering, especially since many, if not all, of the people who witnessed the execution of this agreement have since died. "From a practical point of view, this presumption, although rebuttable, is likely to cause the contract to be void, due to the fact that in the majority of cases the husband is dead and normally there are no other witnesses to refute the wife's allegation."[130] Under these circumstances,

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have received under the laws of descent and distribution. *See, e.g.*, Rocker v. Rocker, 13 Ohio Misc. 199, 232 N.E.2d 445 (1967); Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940); *In re* Borton's Estate, 393 P.2d 808 (Wyo. 1964). Other courts have looked to see if the provision will allow the wife to live as comfortably after the death of the husband as she had previously. *See, e.g., In re* Groff's Estate, 341 Pa. 105, 19 A.2d 107 (1941); *In re* McCready's Estate, 316 Pa. 246, 175 A. 554 (1934). The most recent method of determining reasonableness calls for a weighing of all the facts and circumstances at the time of the agreement including the following: (a) the financial worth of the intended husband; (b) the financial worth of the intended wife; (c) ages of the parties; (d) number of children of each; (e) the intelligence of the parties; (f) whether the survivor aided in the accumulation of the wealth of the deceased spouse; (g) the standard of living which the survivor had before the marriage and could reasonably expect to have during marriage. *See In re* Estate of Hillegass, 431 Pa. 144, 244 A.2d 672 (1968).

130. Note, *Antenuptial Contracts Concerning Property Settlements*, 33 KY. L.J. 197, 199 (1944).

there is no valid justification for relieving the wife of her normal burden of proving the antenuptial contract invalid. There is no foreseeable danger in allowing a wife to bear this burden unaided by any presumptions.

The concept of divesting the wife of her long-recognized presumption is apparently fair. Some jurisdictions, especially Pennsylvania, have moved toward requiring the contesting spouse, whether man or woman,[131] to meet an affirmative burden of proof without the aid of any presumption.[132] For example, in *In re Estate of Hillegass*,[133] the court made the valid, but often overlooked observation that varying decisions on antenuptial contracts have resulted in a lack of clarity, definiteness and certainty. The court then set out to clear away "the confusion and conflicts resulting from different expressions of the applicable standards and principles by stating clearly and more definitely the applicable standards and principles in this field."[134] The *Hillegass* court held that the person seeking to nullify, avoid, or circumvent the antenuptial contract has the burden of proving the invalidity of the agreement by clear and convincing evidence that the deceased spouse at the time of the agreement made neither a reasonable provision for the intended spouse, nor a full and fair disclosure of his or her worth. The effect of this rule, for all practical purposes, is to shift the burden from the heirs of the deceased husband to the wife who is challenging the agreement. Although this rule has been applied in only two subsequent Pennsylvania cases,[135] it has resulted in a greater degree of fairness between the contracting husband and wife.

C. *Groom's Disclosure Versus Bride's Inquiry*

A classic and often repeated rule in the area of antenuptial agreements is that it is not for the woman to inquire but for the man to inform.[136] This rule has often led to the inequitable result of allowing the prospective wife to enter antenuptial negotiations with her eyes closed and to later attack the agreement upon the ground that she did not realize the extent of her husband's estate. It is time for the courts to ask themselves what danger there would be in imposing a duty upon the prospective wife, who contractually waives her rights upon the husband's death, to inform herself of her prospective husband's property. This is not to

131. It should be noted, however, that the limited number of cases found demonstrate that the presumption is reserved solely for the contesting wife. If a husband is contesting the antenuptial contract he normally must bear the full burden of proof unaided by any presumption, regardless of lack of provision made for him in the contract. *See In re* McCready's Estate, 316 Pa. 246, 175 A. 554 (1934).

132. To a lesser degree other jurisdictions have decisions indicating such a movement. *See, e.g.*, Application of Liberman, 4 App. Div. 2d 512, 167 N.Y.S.2d 158 (1957); *In re* Borton's Estate, 393 P.2d 808 (Wyo. 1964).

133. 431 Pa. 144, 244 A.2d 672 (1968).

134. *Id.* at 145, 244 A.2d at 675.

135. *In re* Estate of Lock, 431 Pa. 251, 244 A.2d 677 (1968); *In re* Estate of Harris, 431 Pa. 293, 245 A.2d 647 (1968).

136. *See, e.g.*, Dennison v. Dawes, 121 Me. 202, 117 A. 314 (1922); *In re* Strickland's Estate, 181 Neb. 478, 149 N.W.2d 344 (1967).

suggest adherence to the doctrine "that a man and woman . . . are to be treated like merchant princes dealing with each other each implemented with the exacting and hard instruments of commercialism."[137] However, the more equitable approach would be to treat prospective spouses like merchant princes at least insofar as to impose some duty of inquiry upon the bride.

Perhaps the logic of this suggestion can be seen more vividly by comparing today's situations to the action of contract rescission based upon misrepresentation. Even where there is overt misrepresentation, the majority of courts have imposed some duty of diligence upon the complainant, as opposed to allowing him to blindly rely upon the misrepresentations of, or lack of representation (in the case of some defect) by the respondent. Courts have generally held that a person to whom a false representation has been made is not entitled to relief where he might readily have ascertained the truth by ordinary care and attention.[138] Thus, where the means of knowledge are at hand and are equally available to both parties, the subject matter is equally open to their inspection; if one of them does not avail himself of those means and opportunities, he may not later claim that he was deceived by the other's misrepresentation.[139] Of course, these courts do not require extreme diligence on the part of the moving party; he does not have to investigate if it would be impossible or he would be hindered by the acts of the defendant. There would be little danger in placing some similar duty of diligence upon the contracting spouses. Were a prospective wife required to investigate, there would be some physical sacrifice involved. However, in instances where the information is readily available, it is unfair to allow a wife to enter the contractual relationship with eyes closed, knowing that should it turn out to be a bad bargain, her own inattentiveness will afford grounds for avoiding the agreement.

The first attack upon any suggestion that the wife be given a duty of inquiry is based upon the idea that the prospective husband has an emotional and intellectual dominance over the prospective wife which naturally precludes the wife from investigating or demanding a list of the husband's assets. Today, however, this idea of dominance by the bridegroom is no longer a reality in our society and, therefore, should not serve to prohibit the imposition of a duty to inquire upon the wife. A second argument against the wife's responsibility to inquire is the age-old refrain that the rules of contract law simply should not be admitted into the area of marriage relationships. Although the necessity of such a prohibition may be questionable, this criticism could be blunted by placing upon the contracting bride a duty of inquiry or investigation which is less than the

137. Levy v. Sherman, 185 Md. 63, 74, 43 A.2d 25, 30 (1945).

138. *See* 23 AM. JUR. *Fraud and Deceit* § 155 (1941); 55 AM. JUR. *Vendor and Purchaser* § 62 (1946); J. DAWSON & G. PALMER, CASES ON RESTITUTION 390 (1969).

139. *See* Annot., 174 A.L.R. 1010 (1948).

duty imposed upon an ordinary contracting party. In other words, though courts perhaps should not require an extensive inquiry by the wife, she should not be allowed to escape all responsibility. A satisfactory approach to this problem would be to distinguish between a husband's affirmative misrepresentation of his wealth and his simple failure to disclose the nature and extent of his assets. This distinction[140] could be expressed in terms of misfeasance[141] versus nonfeasance.[142] Under such an analogy, if the prospective bridegroom takes it upon himself to disclose his assets to the prospective wife incorrectly or fraudulently, then she should have no duty to investigate. However, if he never undertakes to disclose his assets, either because he honestly thinks he does not need to or because he desires to keep property from his spouse, the prospective wife should be held to the duty of either (1) investigating to determine the nature and extent of his assets, or (2) insisting that he disclose his assets during the negotiations.

The above distinction should satisfy those critics who are reluctant to view the antenuptial contract in customary contract terms, since this rule requires a lesser duty of the wife than is ordinarily required of a contracting party. Although the prospective wife should not be subject to the doctrine of caveat emptor, she should at least be required to enter premarital contract negotiations with some degree of responsibility and awareness of what is taking place.

V. THE DILEMMA

Judges in the area of antenuptial contracts have found themselves caught in the dilemma of providing for contractual freedom on the one hand and, on the other hand, protecting the state against the support of unwanted wards. Often, the judiciary has found these two concerns to be irreconcilable, as reflected by so many ambiguous, unclear decisions. In addition, attempts to reconcile these two concerns or interests have led to splits of authority in this area of the law. Some judges refuse to enforce such agreements altogether; or if such agreements are enforced, judges apply contract law, developed essentially for commercial dealings.[143] There is a suggested solution to this dilemma which will provide for the greatest possible inter-spousal freedom to contract and, at the same time, will provide the greatest safety against state support of spouses. The optimum legal solution would avoid treating prospective spouses as free-dealing merchant princes but would give them some contractual freedom.

140. This distinction could also be expressed in terms of actual fraud versus constructive fraud, with inquiry by the prospective wife required in the latter but not in the former. *See In re* Borton's Estate, 393 P.2d 808 (Wyo. 1964).

141. The improper doing of an act which a person might lawfully do. BLACK'S LAW DICTIONARY 1151 (4th ed. 1951).

142. The omission of an act which a person ought to do. BLACK'S LAW DICTIONARY 1208 (4th ed. 1951).

143. *See* McDowell, *Contracts in the Family*, 45 B.U.L. REV. 43 (1965).

Initially, any successful solution to the problem depends upon the determination of the primary state interest that demands protection in the area of antenuptial contracts. Most writers agree that, despite the poetic language certain judges have used to the contrary, the chief concern of the state clearly is to keep families together to avoid the possibility that a family member might have to depend upon the state for support.[144] Thus, the common denominator of concern in formulating any rule is to insure that these antenuptial contracts will not shift the burden of supporting the prospective spouse upon the state through its welfare department. Further, it is mandatory that the courts determine whether the state interest is (1) that husbands provide for their wives in the manner to which they have become accustomed or (2) that wives not be relegated to the welfare roles for their livelihood. The prime concern of the state should be protection from having to support the spouse.

The rules used to solve this dilemma must have clarity and predictability. If the policy is to allow parties to antenuptially determine property rights, then there must be rules that will facilitate and guide premarital planning. The present guidelines presented in decisions involving antenuptial contracts are uncertain and unpredictable. One is led to the conclusion that the attorney can give the client desiring such a contract only the "odds" of its being enforced. Many enter these arrangements with a less than positive philosophy. The few writers in this area, after attempting to give a coherent account of the applicable rules, end with a list of guidelines for the drafting and execution of these contracts.[145] These guidelines serve as suggestions, or checklists, to enable the attorney to operate in an area in which the rules are so uncertain that all one can do is simply take safeguards and hope for the best. The prevailing sense of uncertainty suggests that the increased use of antenuptial contracts has been in spite of, rather than due to, the applicable rules governing them.

In devising a rule to meet this dilemma, many would suggest that women and men should be treated equally. Although this approach may be the correct and inevitable direction in which our society is moving, we have not yet reached complete sexual equality. Therefore, any realistic rule that may be devised will have to recognize this difference or inequality in legal treatment. However, in formulating a new rule, courts must not allow this sexual distinction to create an unrealistic imbalance in favor of the woman. Our new rule must obviously be sufficient to insure that the spouses knowingly enter into the contractual relationship. However, such a rule must stop short of being so weighted against the prospective husband with evidentiary burdens and presumptions that the prospective wife carries no burden at all.[146]

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144. *See* Note, *The Validity of Ante-Nuptial Agreements which Limit the Property Rights of the Parties*, 31 B.U.L. REV. 92 (1951).

145. *See* Hayes, *Antenuptial Agreements*, 42 ILL. BAR J. 212 (1953).

146. For a suggested solution and set of rules for antenuptial contracts, see Appendix B *infra*.

VI. CONCLUSION

The American Law Institute has viewed the overriding rule governing antenuptial contracts to be that "[a] bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal."[147] Within the framework of this rule, there is an increasing trend toward interpreting the word "incidents" to mean only those rights and responsibilities which arise during a going marriage. As a result of this trend, the courts will continue to rigidly enforce this rule to void any antenuptial contract which provides: (1) that the husband and wife will forgo sexual intercourse; (2) that the wife will be allowed to choose the domicile of the spouse; or (3) that the husband and wife will never live together.

On the other hand, there will be increasingly more judicial recognition of the right and power of prospective spouses to determine contractually the incidents that arise upon the termination of a going marriage. In the wake of this trend, engaged parties will be given more latitude to determine alimony and property settlement upon divorce, as well as property rights upon death.

This latter trend does exist and, if it is to be meaningful, the courts must develop corresponding rules which are comprehensive, clear, predictable, socially relevant and cognizant of the pertinent public interests.

VII. APPENDIX

A. *People Who Use Antenuptial Contracts*

In order to determine exactly what group of people are most often using the antenuptial contract, this writer surveyed all antenuptial contract cases cited in volume sixteen of the Seventh Decennial Digest covering the years from 1956 to 1966. These cases were read to determine three factors: (1) whether either party had previously been married; (2) whether either party had had children by a previous marriage; and (3) the age of the parties at the time of contracting. This survey revealed the following:

State & Year of Case	Spouse	Previous Marriage	Children	Age
Alabama 1959	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Arizona 1963	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Arkansas 1961	Husband	?	?	50
	Wife	?	?	50
Arkansas 1966	Husband	Yes	Yes	67
	Wife	Yes	Yes	48
California 1956	Husband	Yes	Yes	?
	Wife	Yes	Yes	84

147. RESTATEMENT OF CONTRACTS § 587 (1932) (emphasis added).

State & Year of Case	Spouse	Previous Marriage	Children	Age
California 1956	Husband	Yes	?	?
	Wife	Yes	?	91
Colorado 1964	Husband	Yes	Yes	64
	Wife	Yes	Yes	62
Florida 1962	Husband	Yes	Yes	71
	Wife	?	?	35
Florida 1961	Husband	Yes	Yes	68
	Wife	Yes	Yes	35
Florida 1964	Husband	Yes	Yes	61
	Wife	?	?	51
Illinois 1960	Husband	Yes	Yes	81
	Wife	Yes	Yes	48
Illinois 1963	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Indiana 1962	Husband	Yes	Yes	61
	Wife	Yes	Yes	57
Indiana 1962	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Indiana 1957	Husband	Yes	Yes	75
	Wife	?	?	?
Maine 1961	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Mass. 1960	Husband	Yes	Yes	?
	Wife	?	?	?
Michigan 1962	Husband	?	?	?
	Wife	?	?	?
Missouri 1962	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Missouri 1962	Husband	Yes	Yes	49
	Wife	Yes	Yes	39
Kansas 1963	Husband	Yes	?	?
	Wife	Yes	?	?
Kansas 1965	Husband	Yes	Yes	76
	Wife	No	No	57
Kansas 1962	Husband	Yes	Yes	72
	Wife	Yes	Yes	50
Kansas 1961	Husband	?	?	75
	Wife	?	?	?
Nebraska 1963	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
New York 1958	Husband	Yes	Yes	?
	Wife	?	?	?
New York 1963	Husband	Yes	Yes	72
	Wife	Yes	Yes	57
New York 1957	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
New York 1959	Husband	Yes	Yes	64
	Wife	Yes	Yes	44

State & Year of Case	Spouse	Previous Marriage	Children	Age
New York 1961	Husband	Yes	?	65
	Wife	?	?	?
New York 1963	Husband	Yes	Yes	?
	Wife	?	?	?
Ohio 1962	Husband	Yes	Yes	50
	Wife	Yes	Yes	50
Ohio 1958	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Ohio 1959	Husband	?	?	?
	Wife	?	?	?
Ohio 1959	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Ohio 1962	Husband	Yes	Yes	71
	Wife	Yes	Yes	62
Oklahoma 1957	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Oklahoma 1957	Husband	No	No	60
	Wife	Yes	Yes	55
Oregon 1957	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Penn. 1962	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Penn. 1961	Husband	Yes	Yes	?
	Wife	?	?	?
Penn. 1957	Husband	Yes	Yes	50
	Wife	Yes	Yes	50
Tenn. 1956	Husband	Yes	?	?
	Wife	Yes	?	?
Tenn. 1964	Husband	Yes	Yes	?
	Wife	Yes	Yes	?
Tenn. 1965	Husband	Yes	Yes	70
	Wife	Yes	Yes	58
Texas 1960	Husband	?	?	59
	Wife	?	?	56
Texas 1964	Husband	Yes	Yes	55
	Wife	Yes	Yes	55
Virginia 1957	Husband	Yes	Yes	54
	Wife	Yes	Yes	44
Wisconsin 1965	Husband	Yes	Yes	43
	Wife	Yes	Yes	33
Wisconsin 1959	Husband	Yes	Yes	51
	Wife	Yes	Yes	43
Wisconsin 1959	Husband	Yes	Yes	66
	Wife	No	No	48
Wisconsin 1958	Husband	Yes	Yes	49
	Wife	No	No	23
Wyoming 1964	Husband	Yes	Yes	76
	Wife	Yes	Yes	56

Of the fifty-four cases surveyed, forty-eight (80%) of them involved men who had been previously married. Of these forty-eight men, forty-three (90%) had had children from their former marriages. In only twenty-nine (54%) of the fifty-four cases surveyed were the men's ages reported. Among those whose ages were given, the average age at the time of contracting was sixty-three. Ninety-one percent of these twenty-nine men were over fifty years of age. Twenty-five cases revealed no ages for the men. However, the great number who had been previously married and had had children would indicate that even more were of middle age and over.

Of the fifty-four cases surveyed, thirty-eight (70%) involved women who had been previously married. Of these thirty-eight women, thirty-six (94%) had children from their former marriages. In only twenty-six (49%) of the fifty-four cases surveyed were the women's ages given. Among these whose ages were reported, however, the average age, at the time of the antenuptial contract was executed, was forty-nine years. Of these twenty-six women, eighty-one percent were over forty years old.

B. *A Suggested Solution*

I. Rules Governing Antenuptial Contracts Stipulating Property Rights Upon Divorce and Death:

A. Contracts entered into before marriage settling property rights in the event of divorce or death are favored in the law, because they tend to promote domestic happiness and adjust property questions which might otherwise become a source of litigation. These agreements are to be liberally interpreted to carry out the intentions of the makers, and are to be upheld when they are understandingly made and are not obtained by fraud or overreaching.

B. To assure that these contracts are knowingly entered into and that each spouse is fully aware of the rights which he is waiving, the execution of these agreements should have the following features:[148]

1. Attorneys should be present to represent each party to the contract.[149]
2. A listing in the contract of each spouse's interest in the following types of properties:[150]

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148. It should be pointed out that these features are aimed at aiding full disclosure and mitigating fraud and misrepresentation. These are offered to complement, not replace, those statutory requirements already imposed by some states to govern execution of antenuptial contracts, *i.e.*, that antenuptial contracts must be in writing, that they must be signed by a specified number of witnesses, that they must be recorded, etc.

149. This safeguard has already been suggested by some recent courts as an indicator that there has been good faith. *See, e.g.*, Cantor v. Palmer, 166 So.2d 466 (Fla. 3d Dist. 1964); *In re* West's Estate, 194 Kan. 736, 402 P.2d 117 (1965).

150. A few courts have already been faced with contracts containing an itemization of property and have acted favorably toward them. However, these courts have placed emphasis upon the spouses' placing an estimated value on the property listed. *See* Harlin v. Harlin, 261 Ky. 414, 87 S.W.2d 937 (1935); Daniels v. Banister, 146 Ky. 48, 141 S.W. 393 (1911); Kingsby v. Noble, 129 Neb. 808, 263 N.W. 222 (1935), *In re* McClellan's Estate, 365 Pa. 401, 75 A.2d 595 (1950). These courts apparently look to an estimate of value as

(a) Real Property
(b) Cash
(c) Checking Accounts
(d) Savings Accounts
(e) Stocks
(f) Bonds
(g) Any other personal property worth more than $500.

3. The agreement should be acknowledged before a notary public by either of the parties who, via the contract, is waiving rights in the other's property. Said acknowledgment should be substantially as follows: "I, _______________, a notary public in and for the said county and state aforesaid, do hereby certify that (Spouse Waiving Rights), personally known to me to be the same person whose name is subscribed to the foregoing antenuptial agreement, appeared before me this day in person and acknowledged that she (he) has read and fully understands the effect of the foregoing agreement; that (Spouse Waiving Rights) knows and has been apprised, in accordance with the requirements of the law, of the major portion of the property, both real and personal, owned by (Spouse Not Waiving Rights), as well as his (her) income, and that she (he) is satisfied with the provision made for her (him) in the aforesaid agreement; that she (he) sealed and delivered the foregoing antenuptial agreement as her (his) free and voluntary act for the uses and purposes therein set forth.

____
Signature

C. The features enumerated in Part B are not essential to the validity and enforceability of an antenuptial contract.[151] However, their presence gives rise to a presumption that there has been a full disclosure and a further presumption that the agreement is valid and binding.

D. The presumption stated in Part C is irrebuttable as regards lack of disclosure. In other words, if the features listed in Part B are present, then this closes any inquiry into lack of disclosure. However, the presumption is rebuttable as to fraud committed in the execution of the agreement, *i.e.*, where the listing of property in the contract was incorrect.

evidence that the waiving spouse is aware of what is being given up via the antenuptial contract. Despite this basis for requiring value, it is suggested that a listing of the properties without the corresponding estimated values would be preferable because (1) estimated evaluation invites both conscious and mistaken underevaluation and thus invites attack upon these agreements; (2) it would appear to be no overwhelming burden for a contracting spouse, usually the wife, to make, on the basis of the listed property, his (her) own evaluation of what he (she) is giving up.

151. Except, of course, as one of these features might correspond to a state statutory requirement which is a prerequisite to validity of the antenuptial contract.

E. No lack of provision in the contract for a spouse will give rise to any presumptions of nondisclosure, fraud, concealment, bad faith or overreaching. The spouses, before marriage, are free to waive all interests that may exist upon divorce or death in the properties of each other.

F. If the contract stipulates property rights in the event of divorce, then the contracting parties have the burden of clearly separating alimony from property settlement provisions. Should they fail to meet this burden, *i.e.*, a provision which states "W to receive $1000 in full settlement upon divorce," then the contract will be judged completely under the rules applicable to antenuptial alimony provisions explained in the second section of these suggested rules (Part II).

G. In the event that there remain those who choose to execute antenuptial contracts not in compliance with the features listed in Part B then, as to those contracts, the contesting spouse, whether male or female, has the burden of proving material concealment, misrepresentation or some form of fraud.

II. Rules Governing Antenuptial Contracts Stipulating Alimony Rights in the Event of Divorce:

A. These agreements are not automatically void as against public policy but will be accepted and enforced in accordance with these rules.

B. These agreements are not to be automatically voided as being conducive to divorce unless they contemplate some fraud upon the court, *i.e.*, a provision that one spouse will not contest another spouse's divorce petition, a provision that any divorce procured will be upon an agreed ground, or a provision that the spouses will divorce each other within a given period of time after the marriage ceremony.

C. If the contract complies with the prerequisites listed in section B of Part I, then a presumption arises that there has been a full disclosure with a further presumption that the agreement is valid and binding.

D. The above presumption is irrebuttable regarding lack of disclosure. In other words, if the prerequisites listed in section B of Part I are present, then this closes any inquiry into lack of disclosure. However, the presumption is rebuttable as to fraud committed in the execution of the agreement, *i.e.*, where the listing of the property in the contract was incorrect.

E. If the contract is not in compliance with the three features listed in section B of Part I, then there are no presumptions and the contesting spouse has the burden, in order to overturn the agreement, of proving material concealment, misrepresentation, or some form of fraud.

F. Whether the wife receives a reasonable alimony provision,

an unreasonable provision, or no provision at all, this situation will have no effect upon the enforceability of the agreement and will have no effect upon the burdens of proof as set forth in sections C, D and E.

G. These contracts, if valid in light of the aforementioned rules, are absolutely binding upon the spouse who waives rights in the other's property or income and are absolutely immune from subsequent modification by the courts even upon a showing of changed circumstances.[152]

H. Although such a contract will be permanently enforceable against the wife without modification, it will not prevent a claim by the Commissioner of Welfare against the husband for reimbursement of payments made to the wife should she be forced to seek welfare assistance prior to remarriage. To this extent, these agreements are subject to modification and will be so modified by the courts upon petition of the commissioner.[153]

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152. If the contract provides reasonably for the wife, however, this rule does not affect the usual power of an equity court to modify that provision upon petition of the husband that circumstances have changed rendering him less able to pay the stated amount.

153. This measure is aimed at mitigating the concern for the burden upon the public purse and the concern for the welfare of divorced women. However, it is also a denial of the concern that divorced women be supported in the same manner as during marriage.